



**Koome v Republic (Criminal Revision E002 of 2024)  
[2024] KEHC 15396 (KLR) (Crim) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15396 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E002 OF 2024  
LN MUTENDE, J  
DECEMBER 3, 2024**

**BETWEEN**

**KIRIMI KOOME ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Kirimi Koome, the Applicant, was charged with four (4) counts:
  - (i) Conspiracy to defraud contrary to Section 317 of the Penal Code. Particulars being that he conspired to defraud Desire Mahinyuza, a Rwandese National, the beneficial owner of Stay Online Limited of USD 2,619,583.27 being merchants' funds by falsely representing himself as the owner of the funds.
  - (ii) Stealing by Agent contrary to Section 283 (b) of the Penal code. The particulars were that being the agent of Stay Online Ltd, he stole from it USD 100,000/- which had been entrusted with him to make payment of taxes.
  - (iii) Fraudulent Accounting by Directors contrary to Section 328 (b) (ii) of the Penal Code. Particulars were that he made a false entry in a document for payment of USD 100,000/- to his USD Account No. 1040184xxxxxx domiciled at Equity Bank, Meru, purporting it to be payment of Tax for Stay Online Ltd (K) which was done with the intent to defraud.
  - (iv) Giving false information to a person employed in the Public Service contrary to Section 129(a) of the Penal Code. Particulars being that he informed No. 100xxx P.C. Esther Theuri a person employed in the Public Service as a Police Officer that one Ambrose Wamari Obara had forged



some documents and his signature to obtain a non-estimated amount of money from his account held at United Bank of Africa, information he knew to be false.

2. Prior to the matter proceeding, parties in the case consented to funds held in account Number 550101xxxxxxx in the name of Stay Online Ltd held at United Bank of Africa to be preserved at the Bank to prevent any transactions being undertaken pertaining to the said subject account pending hearing and determination of the Criminal Case No. E816 of 2023.
3. On the 28<sup>th</sup> December, 2023 the complainant in the case, Stay Online Limited applied to have the account unfrozen. By the order of the court dated 29<sup>th</sup> December, 2023, the account was unfrozen so as to allow the complainant to transact.
4. It is upon that background that through an application dated 9<sup>th</sup> January, 2024, the applicant seeks an order of this court to stay the execution orders made by Hon. Dolphina Alego allowing the consent of the parties to unfreeze the accounts; and, to set aside orders allowing the consent to be unfrozen and allowing the complainant to transact on the account.
5. Further, that proceedings before Hon. Ben Mark Ekhubi be stayed for being a miscarriage of justice.
6. The substratum of the matter is that at the time of freezing of the account the applicant was the sole signatory of the Bank Account being the sole shareholder of the said company. That at the time of freezing the account, approximately USD 2.6 million (Ksh. 400 million) was held in the account.
7. That the monies on the account were a crucial and fundamental exhibit therefore the order freezing the same was not prejudicial to any of the parties. After grant of the order the complainant instituted commercial suit No. E357 of 2023 against the applicant herein where a judgment was delivered by Mabeya J. on 27<sup>th</sup> December, 2023 which judgment the complainant relied on to mislead the court that monies and proceeds of the frozen account were not exhibits in the case. That the sitting magistrate failed to appreciate that the monies and proceeds were crucial exhibits in the case and allowed the unfreezing of the account and the complainant to transact on the accounts therein.
8. That the court denied the applicant the right to fair trial as he was served on WhatsApp and had 45 minutes to rush to court and his plea to the court to grant him time to file a formal response was disregarded.
9. That it was erroneous for the learned magistrate to place reliance on a judgment of the civil court without giving the applicant, an accused person, an opportunity to submit on the implication of the said judgment in the criminal proceedings. That the judgment of Mabeya J. has since been appealed and is not the final determination of the company ownership.
10. That if the sum of money frozen is withdrawn it will jeopardize the criminal case.
11. The Respondent filed grounds of opposition stating that the applicant has not demonstrated breach of his fundamental rights which renders the application premature and he has not met two (2) requirements for grant of the order of stay of proceedings as set out by the court of Appeal in *Perry Mansukh Kansangara & 3 others v DPP [2021] eKLR*.
12. By consent of both parties the application was to be disposed through written submission. The applicant through the firm of Mutuma Gichuru & Associates submits that following the decision of Perry Mansukh (*Supra*) revisional jurisdiction is statutory jurisdiction conferred on the High Court by legislation acknowledged by *the Constitution*. A jurisdiction that is aimed at curing manifest irregularities or illegalities and to give directions in the matter in relation to how the trial should proceed as stated in *Joseph Nduvi Mbuvi v Republic [2019] Eklr*.



13. It is also argued that the order issued by the trial court based on the judgment of Justice Mabeya in a commercial suit, was irregular and illegal being a product of procedural flaw as the trial magistrate lacked jurisdiction to review its order.
14. That the applicant was not accorded a fair trial. That the court declined to give the applicant ample time to file a response and proceeded to make a consequential order of reviewing the order founded on a consent of both parties which needed consultation of both parties.
18. It is submitted that orders delivered by Hon. Dolphina Alego on 29<sup>th</sup> day of December, 2023 allowing the consent by the complainant and the respondent on freezing the applicant's accounts and allowing the complainant transact in the bank account No. 5501013001629, United Bank of Africa (UBA) were correct in law, proper and merited as the court relied on the judgment in commercial suit No. E357 of 2023 by Hon. Judge Mabeya, a superior court. That the learned trial court exercised its discretion in a judicial and reasonable manner.
19. Revisionary jurisdiction of the High Court involves reviewing, correcting the decision made by the subordinate court to ensure justice is served. The power emanates from *the Constitution* and Statute.
20. Article 165(3) (e) of *the Constitution* 2010, provides thus:

Subject to clause (5) the High Court shall have- any other jurisdiction, original or appellate, conferred on it by legislation.
19. Section 362 of the *Criminal Procedure Code* provides thus:

The High Court may call for and examine 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.
19. Revisionary power is exercised based on significant issues raised. The Court considering issues on revision does not assess factual findings of the lower court unless it is clear that the court misapprehended issues before it.
20. This is a case where the trial court presided over by Hon. Ekhubi SPM recorded a consent between the parties, the applicant and the respondent who represented the victim where a consent order was entered to preserve funds held in account No. 550101xxxxxxx that were treated as an exhibit in the criminal case on 23<sup>rd</sup> October, 2023.
21. Subsequently, an application was made before Hon. Alego PM to unfreeze the account following determination of a civil case in the High Court. In the subordinate court's view, it had no jurisdiction to determine the matter which had been dealt with by the High Court which found that the applicant herein had converted USD 100,000 which was to be refunded.
22. In the result, the court granted an order unfreezing the accounts, an order that could enable the complainant to transact on the account No. 550101xxxxxxx.
23. The essence of the most serious part of the complaint is that the learned magistrate's court did not have the jurisdiction to review its own order. In that regard, reliance was placed on *Abiud Muchiri Alex v. Republic* [2020] eKLR where the court stated that:

“(12) It is trite law that a court of law can only exercise jurisdiction as conferred upon it by *the constitution* or other written law. It cannot arrogate to itself



jurisdiction exceeding that which is conferred upon it by law. As I have indicated, the sentence which the applicant wishes to have revised was passed by this court upon application for resentencing under the principles of the Muruatetu case (supra). As such the applicant is basically seeking that this court to review its own decision regarding sentence of twenty (20) years imprisonment and further invoke the provisions of Section 333(2) of the Criminal Procedure Code.”

“(14) As such it is my opinion that this court is bereft of jurisdiction to entertain the application herein as the same is tantamount to review its own orders for resentencing. In my considered view, the only time this court can review its own decision is in exercise of the resentencing jurisdiction pursuant to Muruatetu’s decision.”

19. Unlike the contention herein, the afore stated case was a matter of resentencing revision of the sentence pursuant to the principles set in the Muruatetu case.

20. Section 6 of the Magistrate’s Court Act confers upon the magistrate’s court criminal jurisdiction. It provides thus:

A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by— (a) the Criminal Procedure Code (Cap. 75); or (b) any other written law.

19. At the outset, the Hon. Magistrate was seized of jurisdiction to hear the matter that was placed before her. That is why the application was canvassed before her. The order made by Hon. Ekhubi was an interim one. This means that it was a temporary order that would remain in force for a certain duration. For avoidance of doubt, as captured in the consent between the parties, the funds held in Account No. 550101xxxxxxx referred to as ‘an exhibit’ in the criminal case No. E816 of 2023 in the name of Stay Online Limited at United Bank of Africa was to be preserved at the said Bank, to prevent any and all transactions pertaining the subject account, pending hearing and determination of the criminal case.

20. The magistrate’s court has the power to review its own order under specific circumstance, which may include where there is a procedural error, misuse of discretion as exercising the jurisdiction in an unreasonable manner and when there are change of circumstances since the original order was made.

21. In granting the order that reviewed the consent order Hon. Alego PM remarked that the matter came up before her since the magistrate seized of the matter was on leave and justice had to be dispensed with. In its order, the court found that it had ceased to have jurisdiction over the matter as the matter had been determined by the High Court. The learned trial magistrate further observed that the accused (Applicant) had legal mandate to appeal to the High Court. In the result, the court adopted the consent filed between the ODPP and Counsel for the victim.

22. The specific order read thus.

“Pursuant to the Honourable courts- Justice Mabeya Alfred Judgment of the 27<sup>th</sup> of December, 2023 and the Decree emanating therefrom, the complainant Stay Online limited has consented with the Office of the Director of Public Prosecution to have the funds held at the complainants Bank Account domiciled at United Bank of Africa and frozen by the Honourable Courts Orders of 23<sup>rd</sup> October, 2023 unfrozen and the complainant be allowed to transact in the said account being Account No. 550101xxxxxxx United Bank of Africa”



19. It is urged that the applicant was not accorded a fair hearing before an impartial body since the order issued was founded on a consent between the DPP and the complainant/victim which excluded the applicant.
20. On the 27<sup>th</sup> November, 2023, the matter came up in the absence of the DPP and accused/applicant where Counsel for the victim brought to the attention of the court a fact of Hon. Justice Mabeya having rendered a judgment unfreezing the funds that had been frozen. They needed the funds. The matter was scheduled for mention on 28<sup>th</sup> December, 2023. On the stated date the DPP was represented but the applicant (Accused) was absent. The basis of the application was a formal application dated 28<sup>th</sup> December, 2023 which sought lifting of the preservation order. The argument advanced by Counsel for the victim was that the application was unopposed. There is undisputed evidence that the applicant was served with a copy of the complainant's application dated 28<sup>th</sup> December, 2023 on the same date at 10.08 am. He was to take note of the fact of the matter was coming up on the same day at 11.00 am.
21. It was indicated that the application was not contested hence the trial court (Alego PM) advised that a consent be filed and be adopted on 29<sup>th</sup> December, 2023 at 10.00am. On the said date, the applicant appeared in person. Subsequently he was represented by Atuko Ingati advocate alongside Cliff Ombeta and Nyamweya Advocates. It is however recorded thus: "Accused: I fired my lawyers and I have travelled from Meru."
22. It was urged by Ms. Rugut for ODPP that the High Court found the applicant with no locus standi, he was required to refund the Ksh. 100,000 that he had converted hence the preservation order had to be lifted. The court agreed to the position and lifted the preservation order and advised that the applicant could appeal. It has been demonstrated through annexure KK-7 that the applicant filed a Notice of Appeal against the judgment and decision of Mabeya J. but there is no stay of the same hence the order remains in force.
23. An applicant and respondent in a matter should be given an opportunity to present their arguments. Failure to give the respondent the opportunity to present his argument would be a violation of the rights to due process which include the right to be heard. It is prejudicial for the Respondent not to be granted the opportunity which means in such a scenario the order made would undermine the integrity of the process and the legitimacy of the outcome.
24. This is a case where parties entered into a consent but ultimately the trial court acted on a consent signed by the complainant and the DPP but excluded the accused/applicant. The trial magistrate relied on the judgment delivered by the Commercial Court. This infringed on to the process of the applicant as accused. However, this should have been a basis of appeal but not revision.
25. In the result, I decline to grant orders sought.
26. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 3<sup>RD</sup> DAY OF DECEMBER, 2024.**

**L. N. MUTENDE**

**JUDGE**

