



**Muhumed & 5 others v Republic (Miscellaneous Criminal Application E024 of 2025) [2025] KEHC 13933 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13933 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARISSA**

**MISCELLANEOUS CRIMINAL APPLICATION E024 OF 2025**

**JN ONYIEGO, J**

**SEPTEMBER 30, 2025**

**IN THE MATTER OF AN APPLICATION FOR REVISION UNDER SECTIONS 362 AND 364 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF AN APPLICATION BY MOHAMMED MUHUMED KASSIM ALIAS BUKHARI, ABDIRAHMAN ISMAIL ALI, ABDULLAHI ABDI WITO, ABDI OMAR ADAN, ABDI HILLOW NOOR AND ABDI ADEN GURE FOR REVISION FROM IRREGULAR RULING TO REOPEN PROSECUTION’S CASE**

**BETWEEN**

**MOHAMMED MUHUMED ..... 1<sup>ST</sup> ACCUSED  
KASSIM ALIAS BUKHARI ..... 2<sup>ND</sup> ACCUSED  
ABDIRAHMAN ISMAIL WITO ..... 3<sup>RD</sup> ACCUSED  
ABDI OMAR ADEN ..... 4<sup>TH</sup> ACCUSED  
ABDI HILLOW NOOR ..... 5<sup>TH</sup> ACCUSED  
ABDI ADEN GURE ..... 6<sup>TH</sup> ACCUSED**

**AND**

**REPUBLIC ..... PROSECUTION**



## RULING

1. The applicants(accused) herein were jointly charged with three counts inter alia; creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) (B) of the penal code (count 1); preparation to commit a felony contrary to section 308(1) of the penal code (count 2) and; resisting arrest from police officers in due execution of the police officers' duties contrary to Section 103(a) of the *[national police service Act](#)* NO.11 of 2011.
2. Having denied the charges, the matter commenced for full hearing on 14-10-2024. On that day, pw1 testified and due to time constraints, the court adjourned hearing to 11-12-2024 However, on that day, hearing did not proceed as the trial court was said to be attending amobile court session outside Garissa. Consequently, hearing was rescheduled to 23-01-2025. On that day, pw2 testified and the matter was adjourned to 12-02-2025 and 13 -02-2025.
3. On 12-02-2025, accused 5 was absent and the prosecution equally did not have any witness. Prosecution prayed for W/A against accused 5 and at the same time sought more time to have the ODPP headquarters review the file upon request of the 1<sup>st</sup> accused. Consequently, the court issued summons for accused 5 to attend court the following day as earlier on scheduled. The court also directed prosecution to bond witnesses.
4. On 13-02-2025, prosecution indicated that it had one witness but it was not ready to proceed as the ODPP wanted to review several files pending against the complainant by the accused and vice versa. Therefore, the prosecution sought an adjournment till 09-04-2025 by which time they would have done away with the review. Defence counsel was however not opposed. The court made a ruling and rejected the application for adjournment thus directing prosecution to proceed.
5. The prosecution obliged and called pw3 who testified and thereafter sought an adjournment to call four more witnesses. The court allowed the adjourned and had the hearing fixed for 17-03-2025 and 19-03-2025. On 17-03-2025, prosecution was not ready to testify as the investigating officer had been transferred and he did not have any other witness. Nevertheless, the defence opposed the application. The court however allowed the same and fixed the same for hearing on 19-03-2025
6. On 19-03-2025, prosecution was not ready as the file had been called for by the ODPP headquarters for a review which was ongoing hence requested for one month's adjournment. The defence counsel conceded that his client had sought for review hence left the matter with the court to decide. In a short ruling, the trial court declined the application on grounds that prosecution was hell bent to delay the matter. The court directed for hearing to proceed.
7. Prosecution sought for typed proceedings and later intimated to the court that they had made an application in the high court for review of the ruling hence sought for stay of proceedings. In yet another short ruling, the trial court declined stay of proceedings on grounds that there was no stay order and the application was misconceived as none had even been filed. In response, prosecution told the court that they were not ready to proceed as they had no witnesses. The defence sought to submit for no case to answer.
8. The court then proceeded to do a ruling thus denying the application for adjournment and directed to have the prosecution case closed. prosecution opined that it was not ready to submit while the defence was allowed to orally submit on 20-03-2025. On that day, defence counsel orally submitted and the prosecution opted not to submit. Ruling for a case to answer was then fixed for 7-05-2025. On that



- day, the ruling was not delivered as the trial court was attending AJS training. The same was deferred to 12-05-2025.
9. On 12-05-2025, Mr Owino Advocate appeared and sought to be placed on record as watching brief for the complainant. Learned counsel moved the court to re-open the prosecution's case on grounds that there were three crucial witnesses who had not testified and that the complainant would be prejudiced if their evidence was locked out.
  10. Mr. Chacha holding brief for Mr. Bosire counsel for the defence opposed the application arguing that the prosecution having closed their case, the complainant cannot seek to reopen the same. Prosecution however supported the application for re-opening the case.
  11. Consequently, the court did a ruling dated 4-06-2025 allowing the application for reopening the case in the interest of justice.
  12. It is this ruling for re-opening the case that triggered the defence/applicants to file the instant revision application dated 10.06.25 seeking orders that:
    - i. Spent.
    - ii. This Honourable Court do exercise its discretion in revision of trial court's ruling dated 04.06.2025 and stay the intended further hearing of the prosecution's case scheduled for the 16.06.2025.
    - iii. This Honourable Court do exercise its discretion in revision of trial court's ruling dated 04.06.2025 that allowed the reopening of the prosecution's case.
    - iv. Any other relief that the Honorable Court may deem fit to grant.
  13. It was averred that counsel by the name of Mr. Owino made an application seeking for the re-opening of the prosecution's case which application the trial court allowed. That the law did not envisage that the prosecution of criminal cases being a reserve only to the Director of Public Prosecutions could be taken over by counsel watching brief. This court was therefore implored to revise the alleged irregularity that occurred on 04.06.2025 as the same was an affront to the right to a fair trial.
  14. The learned prosecutor, Mr. Bernard Owuor on behalf of the respondent filed a replying affidavit opposing the application arguing that up to the time that the instant application was made, prosecution had presented 3 witnesses in support of its case.
  15. In supporting the ruling of the court delivered on 04.06.2025, the learned prosecutor urged that the victims of a criminal case have a right to participate in the court proceedings as the decision on such proceedings affect them.
  16. In the end, the respondent averred that reopening of the prosecution's case, will allow the matter to be determined based on merit and thus no prejudice shall be suffered by the applicants. That in any event, the defence had already been supplied with the very statements of the witnesses that are yet to be called.
  17. The applicants filed a further affidavit sworn on 18.07.2025 by Mohamed Muhumed Kassim thus deposing that the illegality being challenged was that of the ODPP ceding ground of its constitutional mandate of prosecution to the interested party. That the ODPP should have appealed against the ruling dismissing their prayer for adjournment rather than hide behind the application by the interested party to re-open their case.
  18. The application was canvassed by way of written submissions.



19. The applicant via submissions dated 18-06-2025 basically reiterated the content contained in the affidavit in support of the application. Learned counsel further re-cited the supervisory role of the high court over subordinate courts under Sections 362 and 364 of the CPC and Section 23 of the Office of the Public Prosecutions Act which outlines the mandate of the office of the DPP.
20. In that regard, counsel relied on the case of Republic vs James Kiarie Mutengei( 2017)e KLR where the court stated that revisionary authority can be raised by an aggrieved party or suo motto where an issue on the legality, propriety or procedural irregularity of proceedings is brought to question . Further reference was made in respect to the case of Ndarua vs R (2002)1EA 205 and Kuria & 3 others v Attorney General (2002)2KR where the court held that a high court has inherent powers to interfere with illegal, improper and irregular proceedings.
21. It was counsel’s contention that the order to re-open prosecution’s case was illegal and improper.
22. The respondent filed submissions dated 16-07-2025 contending that the order by the court to re-open prosecution’s case was not illegal, un-procedural nor irregular as the same was done in accordance with the supreme court directions in the case of Joseph Lendrix Waswa v Republic (2020)e KLR which recognized the role of a victim in a criminal case including participation in active prosecution. That the victim has a right to participate in the prosecution of his case hence no prejudice is likely to be suffered by the accused as they will have an opportunity to cross examine witnesses.
23. On the other hand, the victim (interested party) filed submissions dated 3-07-2025 supporting the position that under Section 9 of the *victim protection Act* and pursuant to the holding in the Joseph Lendrix (supra), he had the right to seek recalling of witnesses who were left out. Counsel further made reference to the case of Republic vs Irungu K(2024) KEHC10676 where the court held that it would be unjust to shut out a crucial witness like a doctor in a bid to safe time hence allowed the case to be re-opened to enable witnesses left out testify.
24. I have considered the application herein and the response thereof. In my view, the question to be answered is whether this court should revise the orders made by the trial magistrate in the Chief Magistrate’s court at Garissa in Criminal Case Number E443 of 2024 on 04.06.2025.
25. The constitutional provision on supervisory jurisdiction of the High Court to make orders of revision is aptly captured under Article 165 (6) and (7) of the *Constitution* of Kenya, 2010 which stipulates that:
  - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising 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 the 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.”
26. Statutorily, Sections 362 and 364 of the Criminal Procedure Code empower this Court to deal with the issue at hand and the said sections provide as follows:
  - “362. 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”



364(1). In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to his knowledge, the High Court may-

- a) ...
- b) In the case of any other order other than an order of acquittal, alter or reverse the order.

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.”

27. Under Article 157 of the *Constitution*, the powers to institute criminal proceedings is conferred on the Director of Public Prosecutions. The Director of Public Prosecutions may also take over criminal proceedings instituted by other persons or institutions. In addition, the Director of Public Prosecutions may also discontinue criminal proceedings commenced by his office or by any other person, with leave of the court.
28. It is trite that the key principle in determining whether the prosecution should be allowed to reopen its case is whether the accused will suffer prejudice and in other words, whether the same will affect his/ her defence in any way. A trial judge’s exercise of discretion to permit the prosecution’s case to be reopened and /or to recall a witness must be exercised judicially and should be based on ensuring that the interests of justice are served.
29. The crux of the matter before me is whether the trial court illegally, improperly or un-procedurally acted by reopening the case for abduction of further prosecution evidence on account of the victim’s application even after the court had denied the prosecution an adjournment and fixed the case for ruling on whether there was a case to answer or not.
30. The defence has submitted that a counsel by the name Owino made an application seeking for the re-opening of the prosecution’s case which application the trial court allowed. That the law did not envisage that the prosecution of criminal cases being a reserve only to the Director of Public Prosecutions can be taken over by counsel watching brief. The onus to prove that the order made by the trial court in re-opening the case was illegal, improper and or irregular lies with the defence/applicant.
31. On the question whether the victim’s counsel had the right to move court seeking to call further evidence left out by the prosecution or locked out by the trial court, the Supreme Court in the case of Joseph Lendrix Waswa vs Republic, Petition No. 23 of 2019; [supra], sought to interrogate the extent of a victim’s participation in a criminal matter and what ought to happen when a constitutional issue arises in a criminal trial, which trial ought to be disposed of expeditiously.
32. The Court observed that a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with Section 9(2) (a) of the *Victim Protection Act*, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to consider. The court stated thus:
  78. Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under section 3 of the *Supreme Court Act* as the court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:



- a. The applicant must be a direct victim or such victim’s legal representative in the case being tried by the court;
  - b. the court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;
  - c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;
  - d. The victim’s presentation should be strictly limited to “the views and concerns” of the victim in the matter granted participation;
  - e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;
  - f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the court that have not been posed by the prosecutor;
  - g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;
  - h. The trial court should ensure that the victim or the victim’s legal representative understands that prosecutorial duties remain solely with the DPP;
  - i. While the victim’s views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;
  - j. the court may hold proceedings in camera where necessary to protect the privacy of the victim;
  - k. While the court has a duty to consider the victim’s views and concerns, the court has no obligation to follow the victim’s preference of punishment.
33. In my view therefore, more so in regards to rule (h), Mr. Owino could not purport to wear the hat of a secondary prosecutor. It follows that, the powers to prosecute a suit, the number, type of witnesses to call etc. was solely within the authority of the prosecution to determine hence not the victim or his/her counsel.
34. But as already mentioned, the prosecution also clearly stated that it wished to call the said witnesses in support of its case. Therefore, I will proceed to determine whether the same was merited. Unfortunately, the court had locked out same evidence after prosecution sought for adjournment to send the file to the ODPP for review.
35. The right to fair hearing is provided for under Article 50(1) of the Constitution and the attendant rights of an accused person are set out in Article 50(2) of the Constitution. Article 50 (1) of the Constitution provides:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



36. Considering the rights of an accused person, the victim, and society as a whole, a criminal trial should not only be fair, pragmatic but also constitutionally viable. This position has been recognized and acknowledged in various jurisdictions. See Attorney-General's Reference (No. 3 of 1999) [2001] 2 AC 91 [118], where the House of Lords dealing with a question of law involving the proper construction of section 64(3B) of the Police and Criminal Evidence Act 1984 touching on fairness of a trial observed:

“The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.” [Also see House of Lords decision in R v H [2004] 2 AC].”

37. From the above decision, it is trite that a judge/court must protect the rights of all parties involved in a criminal proceeding. The rights of victims, properly understood, do not undermine those of the accused or the public interest and in fact, the true interrelationship of the three is complementary.

38. In the instant case, prosecution had all the time to call the three witnesses. Failure to exercise due diligence by calling witnesses even after the court had rejected an adjournment to enable it review their evidence was an act of disregard of the victim's interest. Therefore, there was nothing illegal, improper or irregular for the complainant to seek protection of his rights by seeking court's leave to call necessary witnesses.

39. Since the defence was agreeable all along to the court granting an adjournment to facilitate a review of the same file, they have indirectly benefited by getting more than enough time courtesy of this application in having the review of the file which was prompted by them. To that extent, there is no prejudice that will be suffered as each party will be a beneficiary. The three witnesses will be subjected to cross examination hence no prejudice.

40. For the reasons stated above, it is my conviction that the application herein has no merit hence the same is dismissed. The matter to be expedited and be heard on priority basis. The original file be returned to the trial court for further hearing.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2025**

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**J.N.ONYIEGO**

**JUDGE**

