



REPUBLIC OF KENYA



**Musa v Republic (Criminal Revision E003 of 2025)
[2025] KEHC 13941 (KLR) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E003 OF 2025**

JM OMIDO, J

SEPTEMBER 16, 2025

BETWEEN

BOSCO OKUMU MUSA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant's motion by notice dated 28th January, 2025 seeks the following orders:
 - a. [Spent].
 - b. That this Honourable Court be pleased to call for and examine the record and the proceedings in Chief Magistrate's Court at Kisumu Criminal Case No. MCCR E314 of 2024 for the purposes of satisfying itself as to the correctness, legality or propriety of the orders disallowing the Applicant's application for release of motor vehicle registration number KDM 709P, Toyota Fielder, on 21st January, 2025.
 - c. That this Honourable Court be pleased to review the orders of Hon. Mr. D.O. Onyango, Chief Magistrate issued in Chief Magistrate's Court at Kisumu Criminal Case No. MCCR E314 of 2024 on 21st January, 2025.
 - d. That this Honourable Court be pleased to order taking of photos, if the same is to be used as an exhibit, processing and subsequent release of motor vehicle registration number KDM 709P, Toyota Fielder to the Applicant.
 - e. Any other orders that the Honourable Court will deem fit to grant.
2. The application is premised on the grounds set out on its face, which are in precis that:



- a. That the Applicant who is an accused person in the matter before the lower court made an application on 1st October, 2024 that photographs of his motor vehicle registration number KDM 709P, Toyota Fielder (“the vehicle”) be taken for purposes of production as exhibits and that the vehicle be released to him to avoid continued wastage at Kisumu Central Police Station, where it is currently held as an exhibit. The application was disallowed by the trial court.
 - b. That as a result of the application being declined, the Applicant’s fundamental constitutional rights to property, a fair hearing and presumption of innocence continue being violated and that the court has a duty to promote, protect, preserve and bring into reality the values and principles of the Constitution.
 - c. That the order of the learned trial Magistrate was in disregard to provisions of the Constitution.
 - d. That in disallowing the Applicant’s application, the learned trial Magistrate relied on extraneous matters and failed to take into consideration pertinent matters.
3. The application is supported by the Applicant’s affidavit sworn on 28th January, 2025, which expounds on the above grounds.
4. The application is opposed and to that end the Respondent filed a replying affidavit sworn on 4th March, 2025 by Mercy Mutheu Muema, learned Prosecution Counsel. The grounds upon which the application is opposed may be summarized as follows:
- a. That under Section 177 of the Criminal Procedure Code, property introduced as evidence in a criminal trial can only be restituted after the due legal process has been followed, a condition that has not been met before the lower court.
 - b. That the vehicle is a crucial piece of evidence before the trial court and may, in the event of conviction of the Applicant, be subject to forfeiture proceedings.
 - c. That the trial court lacked the requisite jurisdiction to order for the release of the vehicle.
 - d. That the order of the trial court declining to order for the release of the vehicle to the Applicant is not one that can be revised by this court.
5. This court directed that the application proceeds by way of written submissions and both sides filed their respective submissions.
6. I have considered the application, the affidavits in support of and in opposition to the motion, the submissions by the parties and the record of the lower court. The issues that emerge for this court to determine are as follows:
- i. Whether the learned trial Magistrate had the jurisdiction to order for the release of the vehicle to the Applicant.
 - ii. Subject to (i) above, whether the Applicant has demonstrated that there is any incorrectness, illegality or impropriety in the order of the trial court declining the Applicant’s application.
7. It is instructive from the charge sheet in the record of the trial court (which has been placed before me) that the Applicant is presently facing trial vide Kisumu Chief Magistrate’s Court Criminal Case No. MCCR E314 of 2024 in which he is jointly charged with another with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act.
8. The prosecution alleges in the particulars of the offence that on 25th July, 2024 at Kisumu Pipeline Roundabout, Kisumu West Subcounty within Kisumu County, the Appellant and his confederate



jointly trafficked by transporting narcotic drugs, to wit cannabis 6.9kg with a street value of Ksh.207,000/- using a motor vehicle registration number KDM 709P make Toyota Fielder, black in colour, in contravention of the said Act. The two denied the charge and the trial continues.

9. The trial court rendered itself as follows on the application seeking that the vehicle be released to the Applicant:

“I have considered the Applicant’s case and his fears that the motor vehicle may be wasted or that he has denied its use for several months before the case can be heard and determined.

From the material placed before court, there is no doubt that the suit motor vehicle is a potential exhibit. This calls for strict preservatory orders to protect both the interests of the prosecution and the Applicant. It is not lost on me that the Applicant has a constitutional right to be presumed innocent until proven guilty. I have however considered the peculiar circumstances of this case including that the Applicant is the 1st Accused person who is alleged to have been driving the suit motor vehicle as at the time of arrest. If this is so, chances are that release of the exhibit to him at this stage is likely to be prejudicial to the prosecution. Nothing will stop the Applicant from interfering with the exhibits in a manner that will jeopardize not only the hearing but the subsequent forfeiture proceedings should the prosecution succeed in securing a conviction.

It is my considered finding that motor vehicle registration number KDM 709P should be kept in a secure environment in the custody of the OCS Kisumu Central Police Station pending hearing and determination of the case,

To avoid causing further prejudice to the parties, I direct that the hearing herein shall be given priority dates so that all issues in controversy are determined without further delay”.

10. It is clear from the words of the learned trial Magistrate that he considered the positions of both parties, the possibility of an order of forfeiture being made in future and the need to preserve the vehicle, hence his order that the vehicle be kept in a safe environment under the custody of the OCS Kisumu Central Police Station and that the matter be fast-tracked.
11. The order subject to which the application for revision is presented is therefore the one declining to grant the orders that the Applicant sought before the trial court.
12. The first issue for me to determine is whether the learned trial Magistrate had the jurisdiction to order for the release of the vehicle to the Applicant.
13. Courts have been consistent on the manner in which the issue of jurisdiction, once raised either by the parties or by the court sua sponte, should be handled. The issue of jurisdiction must first be determined before the court delves into any other matter(s).
14. In the case of *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR, the court stated as follows on jurisdiction:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance,



or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

15. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Justice Nyarangi held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

16. In the Supreme Court case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others* [2012] eKLR, the court rendered itself thus:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

17. My interpretation of Section 177 of the Criminal Procedure Code is that for a court to be clothed with the requisite jurisdiction to order for the release or disposal of exhibits, the court must first own the exhibits. The only way, in a criminal trial that exhibits become property of the court is when they are produced as such. Before the production, the court does not have the authority to order for their release or disposal.

18. In the case of *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR this court (Bwonwonga J) on an application for revision where a Magistrate’s Court had ordered for the release of a motor vehicle before its production held as follows:

“I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent/accused in order as that court put it “to save it from the wear and tear due to immobilization of the engine.” The reason for this is that the motor vehicle had not been produced as an exhibit in court. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.....I find that the trial court did not have jurisdiction to order the release of the subject motor vehicle to the accused, given that the prosecution intended to use it in proving their case against the accused person.”

19. In the case of *Director of Public Prosecutions v Marias Pakine Tenkewa t/a Naresho Bar Restaurant* [2017] eKLR the High Court allowed an application for revision of an order of a Magistrate in which trial court ordered for the release of exhibits upon photographs being taken but before the exhibits were produced in evidence. The court (Nyakundi J) observed that the release of the exhibits was premature as they had not been marked, identified and produced in evidence.



20. Bwonwon’ga J in the case of *Elijah Nyakebondo Onsongo v Republic* [2017] eKLR on revision, held that a Magistrate’s court can only make an order of restituting property to a proved owner under the provisions of Section 177 of the Criminal Procedure Code, when the goods or items have been produced in evidence as exhibits before the court
21. It is instructive from the record of the trial court that the vehicle in question is yet to be produced as an exhibit. My persuasion thus is that the trial Magistrate did not have the jurisdiction to order for the release of the motor vehicle to the Applicant.
22. I will move on to the second issue for determination which is whether the Applicant has demonstrated that there is an incorrectness, illegality or impropriety in the order of the trial court declining the Applicant’s application.
23. This court is clothed with supervisory jurisdiction over subordinate courts by virtue of Article 165(6) and (7) of *the Constitution* and Section 362 of the Criminal Procedure Code.
24. Let us read the provisions:
Article 165 of *the Constitution*
 - (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.”
Section 362 of the Criminal Procedure Code:
362. Power of High Court to call for records
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.
25. From the above provisions, the powers of revision of the High Court over the records of the courts subordinate to it are limited to the court satisfying itself of 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.
26. Section 364(1) of the Criminal Procedure Code provides that the High Court may, in revising an order of the lower court, other than an order of acquittal, alter or reverse the order.
27. What essentially this court has been asked to do is to consider setting aside the order of the trial court and substitute the same with an order directing that the vehicle be released to the Applicant. The Applicant has not pointed out anything that would otherwise render the order of the trial court to be incorrect, illegal or as lacking propriety. In any event, as we have seen above, the learned trial Magistrate did not have jurisdiction to grant the order that was sought by the Applicant and therefore properly declined the Applicant’s invitation, albeit on different reasons.
28. Revision in exercise of the court’s supervisory powers is limited to the court 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.



29. In the case of Muriuki (130358) v Kiprotich (Criminal Revision E209 of 2022) [2022] KEHC 16208 (KLR) (Crim) (7 December 2022) (Ruling), the court spelt out that the High Court on revision, must exercise restraint and limit itself to matters that strictly fall under Section 362 of the Criminal Procedure Code, so that it does not micro-manage business that is the reserve of the trial court. The court stated as follows:

“The court must also deflect any attempts by parties inviting it to micromanage the trials before the subordinate courts and tribunals, also for the very same reason of possible embarrassment in case of appeal. And also no the fact that the subordinate courts and tribunals, are independent institutions which ought to be aided and facilitated to exercise their independence in the manner in which they exercise both their constitutional and statutory mandates.”

30. Addressing itself to the same issue, the court in the case of Republic v James Kiarie Mutungei [2017] eKLR, the court held that:

“.....function of the court under Section 362 of the Criminal Procedure Code as read with Section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal so as to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning... The interference under Section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness and suitability to trial...”

(Underlined emphasis).

31. It was held in the case of Republic v Samuel Gathuo Kamau [2016] eKLR, that:

“Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make.”

(Underlined emphasis).

32. Having said so much, it is clear that this court cannot exercise powers of revision of the lower court’s order declining and/or disallowing the Applicant’s application for the release of the vehicle, first because the trial court had no jurisdiction to make the order, and second, because the matters raised through the application that is subject of this ruling do not fall under Section 362 of the Criminal Procedure Code.

33. The upshot then is that the Applicant’s application for revision dated 28th January, 2025 lacks merit and is dismissed.

34. I hereby direct that a copy of this ruling be placed in the trial court’s file and that the trial court’s file be placed before Hon. D.O. Onyango on 6th October, 2025 for directions, so that the trial proceeds apace. The Applicant is ordered to appear before the trial court on that date.

35. This file is hereby closed.

36. Orders accordingly.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 16TH DAY OF SEPTEMBER, 2025.



JOE M. OMIDO

JUDGE

For The Applicant: Ms. Wanjiru For Mr. Oduk.

For The Respondent: Ms. Muema.

Court Assistant: Mr. Ngoge.

