Odote v Aggarwal & another (Miscellaneous Criminal Application E180 of 2025) [2025] KEHC 14912 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14912 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION E180 OF 2025

A MABEYA, J

OCTOBER 24, 2025

BETWEEN

AMOS OCHIENG ODOTE ..... APPLICANT

AND

ATIN KUMAR AGGARWAL ..... 1ST RESPONDENT

GAURI MEHTA ..... 2ND RESPONDENT

RULING

1. By a Motion on Notice dated 25/9/2025, the applicant seeks to have this Court revise the orders issued by Hon. B. Ireri (CM) on the 16/9/2025 disallowing him from filing submissions in response to the respondents' final submissions.

2. The application is brought under Articles 2 (5) and (6), 20, 50 (1) (j) and (9), 15 (6) and (7) of *the Constitution* of Kenya, Sections 362 and 364 of the Criminal Procedure Code as well as Sections 1 (a) (b) and (c), 2 (a) – (d), 4 (b), 7 (b), 9 (1) (c) and 13 (a) and (b) of the Victims Protection Act and is anchored on the grounds therein as well as the supporting affidavit of Amos Ochieng Odote sworn on the 25/9/2025.

3. The applicant is the complainant in Kisumu Magistrates Court Criminal Case 486 of 2014 that has been set for delivery of judgment on the 17/11/2025. The respondents herein are the accused persons. The applicant contends that the trial court intends to render judgment without giving him an opportunity to put in his submissions thus infringing on his right to a fair trial as enshrined under Article 50 of *the Constitution*.

4. That since the ODPP opted not to file submissions, the respondents right to a fair trial is not going to be prejudiced by the applicant filing his submissions and also that filing of the submissions does not amount to opening of the case.

5. The application is opposed vide the replying affidavit sworn by Atin Aggarawal, the 1st respondent on the 9/10/2025. It was deposed that the applicant does not have locus standi to file and prosecute the application and the same ought to have been undertaken by the prosecution as mandated under section 5 of the Public Prosecutions Act as read with Article 157 of *the Constitution*.

6. That having been charged with various offences as detailed in the charge sheet brought against them, he and the 2nd respondent pleaded not guilty and were released on bond.

7. That the case proceeded for hearing and they were placed on their defence and at the end of the trial, the matter was fixed for mention for submissions on 11/3/2025 when the prosecution as well as the advocate watching brief for the applicant had not filed their submissions while they had filed their submissions.

8. That subsequently, the matter was adjourned to 1/4/2025 to enable the prosecution and the advocate watching brief for the applicant file their submissions but they still did not file submissions by then leading to a further adjournment to the 14/4/2025.

9. That on the 14/4/2025 the prosecution indicated that it did not intend to file any submissions whereas the advocate for the applicant indicated that he had filed an application which he wanted heard before the court set a date for judgment thus the court adjourned the case to 12/5/2025.

10. That on the 12/5/2025, the applicant's advocate filed an application dated 8/5/2025 seeking to adduce additional evidence and consequently the matter was fixed for mention on 10/6/2025 when the applicant's application was dismissed and thereafter the matter fixed for judgment on the 1/7/2025.

11. That on the 26/6/2025 as the matter was pending judgment, the applicant filed an application dated 25/6/2025 seeking to have the trial magistrate recuse himself from the matter and that his advocate be allowed to file submissions. That the court thus stayed the judgment scheduled for 1/7/2025 and in a ruling delivered on the 5/8/2025 recused himself and forwarded the matter to court 2 for further action.

12. That on the 16/9/2025 when the matter came up before Court No. 2 for directions, directions were taken as per section 200 of the Criminal Procedure Code by consent that the matter proceed from where it had reached thus the court fixed the matter for judgment on 17/11/2025.

13. That the orders sought by the applicant, if allowed, would prejudice them given that they had already filled their submissions whereas the delay of over 7 months by the applicant is unwarranted. That the actions by the applicant is meant to delay the expeditious conclusion of the matter.

14. As a preliminary issue, the question of whether the applicant has locus standi is moot. This is so because *the Constitution* and the *Victim Protection Act* – No. 17 of 2014 now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process.

15. The constitutional and statutory role of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process. The nature and scope of the victim's intervention prescribed by the VPA should be interpreted in conformity with *the Constitution* and implemented by the trial court at the appropriate stages of proceedings as the justice of each case requires. It is the duty of the trial court to conduct a fair trial and to protect and promote the principles of *the Constitution* (Article 159(2) (e)).

16. The rights granted to victims of offences just like the rights conferred by the Bill of Rights are to be liberally construed. Some rights in the trial process are stipulated in the VPA, such as the right to submit information during plea bargaining, bail hearing and sentencing (section 20, section 12), the right to adduce evidence which has been left out and to give oral evidence or written submissions (section 13).

17. I thus find that the applicant has locus standi to institute the instant application.

18. Turning to the main issue for determination, the applicant seeks to have this Court revise the orders issued by Hon. B. Ireri (CM) on the 16/9/2025 that disallowed him from filing submissions in response to the respondents' final submissions.

19. The High Court's power of revision is set out in Article 165 (6) and (7) 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 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."

20. Section 362 of the Criminal Procedure Code provides: -

> "The High Court may call 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."

21. Section 364(1) of the Criminal Procedure Code provides: -

> "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"-
>
> In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
>
> 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."

22. The revisionary jurisdiction of the High Court was discussed by Odunga J, as he then was, in a persuasive decision of Joseph Nduvi Mbuvi v Republic [2019] eKLR: -

> "In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary

jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

23. Consequently, the question that this court encounters and the threshold for exercise of revisionary powers is whether there were manifest irregularities or illegalities by the subordinate court.

24. The record is clear that at the end of the trial on the 27/1/2025, the parties were directed to file submissions, that on 6 different occasions ending with the date of the impugned ruling of the subordinate court, on the 16/9/2025, the applicant had the opportunity to put in his submissions but failed to do so.

25. That on the 16/9/2025, the trial court in conformity with the provisions of section 200 of the Criminal Procedure Code brought to the attention of parties the requirements of the said sections and the counsel on record for all the parties, including the applicant's, agreed to proceed with the trial from where it had reached.

26. For this court to exercise its revisionary jurisdiction over the trial court, it has to be satisfied that the trial court in exercising its discretion misdirected itself and had been clearly wrong in the exercise of the discretion and that as a result, there had been injustice.

27. Article 157(1) of *the Constitution* establishes the office of the DPP. The State's prosecutorial powers are vested in the DPP under article 157 of *the Constitution*. That office, under article 157(10), neither required the consent of any person to institute criminal proceedings nor is it under the direction or control of any person or authority. Those provisions are also replicated in section 6 of the *Office of the Director of Public Prosecutions Act*, 2013. The office of the DPP is the sole constitutional office with the powers to conduct criminal prosecutions.

28. Consequently, the complainant had no active role in the decision to prosecute, or the determination of the charge upon which the accused would finally be tried. That was the sole duty of the DPP. While the complainant of a crime could participate at any stage of the proceedings as deemed appropriate by the trial court, a complainant or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP had to at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory power of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

29. A complainant cannot wear the hat of a secondary prosecutor. In the instant case, the prosecution indicated that they were not going to file any submissions. When the victim presented his views and concerns in accord with section 9(2) (a) of the *Victim Protection Act* (VPA), the victim was assisting the trial court to obtain a clear picture of what happened and how they suffered, which the trial court could decide to take into account.

30. Victim participation should meaningfully contribute to the justice process. However, that does not mean that the court's judgment would follow the wishes of the victim. The trial court would take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

31. The applicant now seeks to file his submissions. Under Article 50(2)(e) of *the Constitution*, an accused person is guaranteed the right to have a trial start and end without undue delay. Additionally, under

section 9(1)(b) of the *Victim Protection Act* (VPA), a victim has the right to have the trial start and end without undue delay. Furthermore, courts were required by *the Constitution*'s Article 159 (2) (b) to ensure that justice is served promptly.

32. Two things militate towards interfering with the discretion of the trial court. Firstly, although the applicant and the prosecution had delayed in filing the submissions, the now trial court did not take the evidence in the case. The evidence was taken by a different court which recused itself. The current trial court is only to write the judgment.

33. Secondly, curiously, the prosecution decided that it will file no submissions. While it is expected that the prosecutor was to be the mouthpiece of the applicant, it has denied the applicant that opportunity. Finally, the judgment is over 30 days away. There would be no prejudice to be suffered as the respondents can put their rebuttal submissions.

34. Accordingly, I allow the application. I set aside the order disallowing the applicant from filing his submissions and substitute therewith an order permitting the applicant to file submissions within 7 days of the date hereof and the respondent to file their rebuttal submissions within 7 days of service.

35. The matter be mentioned before the trial court on 30/10/2025 for further directions. That is well before the date set for judgment.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025.

A. MABEYA, FCI Arb

JUDGE