



Republic v Korio & 2 others (Miscellaneous Criminal Application E286 of 2024) [2025] KEHC 15079 (KLR) (14 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E286 OF 2024**

**JM OMIDO, J
OCTOBER 14, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

WILSON OLOSHURO KORIO 1ST RESPONDENT

LEMENDIYA PARMET MBUKOTI 2ND RESPONDENT

JAKAYA MELUBO PASWA 3RD RESPONDENT

RULING

A. Background

1. The Applicants are presently facing trial vide Kisumu CM’s Criminal Case No. E992 of 2022 in which they are jointly charged in the first count with the offence of being in possession of wildlife trophies of an endangered species without a permit or exemption contrary to Section 92(4) of the Wildlife Conservation (Management) Act, 2013; and in the second count with the offence of dealing with wildlife trophies of an endangered species without a permit or exemption contrary to Section 92(2) of the same Act.
2. It is instructive from the record of the criminal case before the trial court, which is before me, the Applicants denied the charges and the matter thereafter and the trial is proceeding.
3. On 4th December, 2024, the matter was placed before the trial court, presided over by Hon. E.A. Obina, SPM for further hearing of the prosecution case. The learned Prosecution Counsel in conduct of the case Mr. S. Muriuki informed the court that he was ready to proceed with the matter but would not be able to conclude the prosecution case.
4. With that, the 6th prosecution witness was placed in the witness stand and tendered his testimony and was cross examined. The prosecution then placed its 7th witness, an expert witness, in the stand.



However, the learned defence Counsel Mr. Adawo rose and informed the trial court that his clients had not been supplied with the witness's expert report and that PW7 was not among those listed as witnesses in the list that the defence was given by the state. The learned defence Counsel submitted that allowing the witness to testify would be an ambush to the three Applicants and therefore objected to the evidence of the witness being taken.

5. In response to Mr. Adawo's submissions, Mr. Muriuki told the trial court that he was ready to furnish the defence with a copy of the expert witness's report, noting that it was a crucial part of the prosecution's evidence, thus seemingly admitting that the defence had not had sight of it. No reasons were given as to why the said document was not timeously supplied to the defence. Effectively, Mr. Muriuki made an application for adjournment, which was strenuously resisted by the defence.

6. In his ruling on the matter, the learned trial Magistrate stated as follows:

- “ 1. It is not clear why the document was not supplied earlier.
2. Guided by the court's proceedings from 28th December, 2022 and mindful of the fact that two accused are in custody, I proceed to give the following directions:
 1. That the witness in the dock cannot testify and rely on a document that is being supplied to the defence now.
 2. The application for adjournment is disallowed. The case to proceed for hearing.
 3. The state is granted twenty (20) minutes to reorganize themselves.”

7. Immediately following the ruling, the learned Prosecution Counsel made an application for an adjournment on the grounds that there was another crucial witness who was not present as he was attending another court session in Milimani Law Courts in Nairobi. The Prosecutor further informed the trial court that there was a document – an exhibit memo form – that was in its possession that the State wished to rely on in evidence and craved leave of the court to supply a copy upon the defence.

8. As one would expect from that day's previous proceedings, Mr. Adawo opposed the application for adjournment and for reliance by the prosecution on the said exhibit, as the same had not been supplied to the defence, noting that the trial court had already pronounced itself on the issue of another document (the expert report) that had not been supplied to the defence. Counsel further noted that the prosecution had on an earlier occasion been granted a last adjournment.

9. On that application, the trial court rendered itself as follows:

- “ This court has already pronounced itself on the application for an adjournment which was earlier made and disallowed. The state have a remedy in an appeal, revision or review.
The application is disallowed.”

10. With his limited options at hand, Mr. Muriuki closed the prosecution case.

B. The Notice of Motion Dated 20th May, 2024.

11. The above two rulings of the trial court triggered the filing by the State of the application by motion on notice dated 16th December, 2024, expressed to be brought under Articles 165(6) and (7) of the



Constitution Kenya and Sections 362, 364 and 367 of the Criminal Procedure Code, Cap 75 Laws of Kenya which seeks the following orders:

- a. THAT this Honourable Court do call for the records of the Chief Magistrate’s Court at Kisumu in Criminal Case No. E992 of 2022 Republic v Wilson Oloshuro Korio & 2 others for the purposes of ascertaining the correctness, legality or propriety of the records and proceedings and exercising its supervisory jurisdiction under the Constitution.
 - b. THAT this Honourable Court be pleased to issue orders of revision in Kisumu Chief Magistrate’s Criminal Case No. E992 of 2022.
 - c. THAT this Honourable Court do set aside the orders of the Honourable Ezekiel Obina, SPM, issued on 4th December, 2024 directing the closure of the prosecution case.
 - d. THAT this Honourable Court orders that the matter be reopened and heard before a different Magistrate within the court’s jurisdiction.
 - e. THAT this Honourable Court be pleased to issue any other appropriate orders in the interests of justice.
12. The grounds upon which the application is premised are set out on its face, and are in precis as follows: That the trial court directed the prosecution to either close their case or withdraw it, forcing the prosecution to prematurely close its case. That the investigating officer confirmed that the expert’s report had been supplied to the Applicants via email on 31st January, 2024. That witnesses whose evidence is crucial were denied an opportunity of testifying. That the matter before the trial court is one of great public interest as it involves endangered wildlife species. That no prejudice will be occasioned upon the Applicants should the application be allowed.
13. The application is supported by the affidavit of KWS No. 8410 (AWIII) Timothy Indeche, sworn on 16th December, 2024 and a further affidavit sworn by the same officer on 20th March, 2025. The affidavits restate and expound on the above grounds, particularly that: That when the matter came up before the trial court for hearing on 4th December, 2024, the prosecution presented two witnesses – an expert witness and another witness. That although the regular prosecutor in the matter Mr. Okoth was not present as he was handling High Court matters, the trial court compelled Mr. Muriuki to proceed with the matter. That the trial court declined to take the expert’s evidence on the basis of the objection by the defence that the Applicants had not been furnished with a copy of the expert report. That Mr. Muriuki was duly informed by the deponent that the report had been supplied to the Applicants via email on 31st January, 2024 but the trial court “disregarded this information and stood down the witness without allowing the prosecution counsel to adequately address the issue of service, thereby undermining the fair administration of justice”. That the trial court disregarded other information on the reasons why other witnesses were not present; that one Rodney Kimutai was attending a pass out ceremony at KWS Academy in Manyani and one Mulei Bernard was attending to another case in Milimani Court. That on 20th December, 2024, this court (Shariff J.) issued an order of stay of the proceedings before the trial court. That notwithstanding the issuance of the order of stay of proceedings of the trial court matter, further proceedings were taken on 17th January, 2025, whereby the court rendered its ruling on a prima facie case.
14. The application is opposed and to that end the 1st Respondent filed a replying affidavit sworn on 11th February, 2025 by the 1st Respondent.
15. In his affidavit, the 1st Respondent has made depositions that: That the depositions made in the supporting affidavit are largely untrue. That the prosecution has intentionally and unwarrantedly



delayed the trial before the lower court, resulting in the matter coming up for hearing 19 times and for mention 27 times. That on 27th November, 2024, the trial court, with the consensus of the parties, granted the prosecution a last adjournment. That despite their being an order of last adjournment, the prosecution again applied for another adjournment on 4th December, 2024. That the allegation of service of the expert report was not substantiated by the prosecution and that in any event, the non-service of the same was conceded by the prosecution.

C. The Record of the Trial Court.

16. As the trial court is a court of record, it is impelling that I note down what was recorded by Hon. Obina when the matter came up before him.
17. It is instructive from the record of the trial court, which is before me that the matter was in court on 27th November, 2024 and the court noted that there was no tenable ground presented by the State to warrant an adjournment but nevertheless granted a last adjournment to the prosecution. A further hearing date for 4th December, 2024 was set and Mr. Okoth, the learned Prosecution Counsel then present, informed the court that appropriate arrangements would be made for an alternative prosecutor to be present as he would be away on the next hearing date.
18. The allegations made by the deponent of the supporting and further affidavits that Mr. Muriuki was compelled to proceed on 4th December, 2024 when he was not in conduct of the prosecution are therefore not true, as Mr. Okoth had stated that appropriate arrangements would be made for another prosecutor to handle the case. If anything, Mr. Muriuki's application for adjournment on that day was not premised on the grounds that he was not in a position to proceed.
19. The other clarification that I will make is that when the defence complained that the expert's report had not been supplied, the prosecution did not state, as claimed in the affidavit in support of the application, that the document had been sent to the defence via email. The response by Mr. Muriuki to the issue was as follows:

“The exhibit is in the police file. We undertake to provide the same. It is a critical part of the evidence. It forms a critical part of our evidence.”
20. As can be discerned from the court's ruling (reproduced above) the learned trial Magistrate reached the finding that there was no tenable reason given as to why the document had not been supplied to the defence. The attendant application for adjournment was therefore declined with the court noting that a last adjournment had been issued on 27th November, 2024. The allegation in the supporting affidavit that the court was informed that the expert's report was supplied to the defence on 31st January, 2024, could therefore not be any further from the truth.
21. The record of the trial court bears it that shortly after the application for adjournment had been refused, the prosecution applied for yet another adjournment on the ground that there was a witness who was in Milimani Court and was therefore not able to attend court. The court held that it had already pronounced itself on the issue of adjournment and declined to allow the application.
22. I further note from the proceedings of the trial court that the order of stay of proceedings was never brought to the attention of the trial Magistrate. As a matter of fact, the deponent of the further affidavit confirmed that the same was never served upon the trial court in spite of Shariff J.'s order that the same be served within four days. The complaint that the trial Magistrate proceeded to deliver the ruling on prima facie case when this court had stayed the proceedings of the trial court does not, in the circumstances, hold water.



D. Issues for Determination.

23. This court directed that the application be canvassed by way of written submissions. Both sides filed their respective submissions.
24. I have considered the application, the two affidavits in support thereof, the replying affidavit, the submissions by the two sides and the record of the lower court. The following issues emerge for this court to determine:
 - a. Whether the Applicants have placed before me tenable reasons and/or grounds that would warrant this court to exercise its revisionary jurisdiction under Section 362 of the Criminal Procedure Code in respect of the two rulings of the trial court.
 - b. What orders commend the Applicants' notice of motion dated 16th December, 2024.

E. Analysis and Findings.

25. I will determine the above issues in the order that I have set them out.
26. 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.
27. 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.

28. 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.
29. 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.



30. What essentially this court has been asked to do is to reverse the order of the trial court vide which the court declined to take the evidence of the expert witness and the attendant orders refusing to allow the prosecution's application for adjournment on the reasons that were given.
31. What is clear from the ruling of the trial court when it declined to take the evidence of the expert witness is that the court was applying Article 50(2)(f) of the Constitution that dictates that every accused person be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. The court's interpretation of the said provision is a merit decision. In the case of *Ogutuu & another v Republic* (Miscellaneous Criminal Application E077 of 2024) [2025] KEHC 10888 (KLR) (24 July 2025) (Ruling) Neutral citation: [2025] KEHC 10888 (KLR) I stated as follows regarding revision of merit decisions:

“ 43. With respect, I am of the persuasion that the exercise of the court's revisionary powers does not include revision of merit decisions. As we have seen above, 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.

A decision to the effect that a prima facie case has been made out against an accused person is a merit decision. Remembering that the trial court is at that stage not required not to give reasons for the decision to place an accused person on his defence, it would be impossible for this court to revise the said decision on its merits (where there are no reasons given), as doing so would be speculative of the reasons of the trial Magistrate.

45. My view is similar to that of the court in the case of *Muriuki (130358) v Kiprotich* (Criminal Revision E209 of 2022) [2022] KEHC 16208 (KLR) (Crim) (7 December 2022) (Ruling), wherein the court held:

“The second ground the Applicant has raised in seeking to have the finding and orders of the court martial (revised) is that the prosecution never produced any or any sufficient evidence upon which the court martial could rely in making a finding that a prima facie case had been established against the applicant sufficient enough to have him be placed on his own defence. The Applicant has gone ahead to bring out the evidence of each of the prosecution witnesses.

In essence, what the Applicant is asking this court to do is to re-evaluate the evidence before the court martial in order to come up with a different finding. These, to me are matters that would properly be handled on appeal should the applicant's case reach that stage. The court sitting on its revision jurisdiction, cannot delve into the detailed analysis of the evidence presented at the trial. And for good reason. Were the court to go deep in the analysis as urged, only for the matter to proceed on to appeal, the court would be put in an embarrassing situation of re-determining the same issued it had already determined by way of revision.”



(Underlined emphasis).

46. In the case of Rai & 5 others v Republic (Criminal Revision E026 of 2024) [2024] KEHC 11363 (KLR)(Crim)(30 September 2024) (Ruling) the court held that:

“Revision as a process does not delve into the merit of the impugned decision. Similarly, unlike an appellate court where parties challenge the decision made the revision court cannot replace or alter findings of a trial court with its own findings, this power is vested on the appeal court.”

47. The case of Muriuki (supra), spells 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.”

48. 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).

49. 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).



50. Having said so much, it is clear that this court cannot exercise powers of revision of the lower court's merit decision, such as the finding that a prima facie case has been made out against an accused person, and substitute the same with its own finding.
51. Further, this court cannot purport, in exercise of revisionary powers, to proceed to exercise the constitutional and statutory mandates of the trial court by evaluating the evidence adduced in the trial, or considering the defences of the Applicants. It will amount to usurpation of the trial court's powers and/or mandate for me to consider the evidence before it and make findings and a determination of the same, if this court proceeds to interfere with the ruling of the trial court, by revising it."
32. This court has no power to revise the decision to disallow the evidence of the expert as the same was a merit decision. A merit decision can only be upset by an appellate court. Further, this court does not have the requisite jurisdiction to consider the new evidence of service that was introduced through the supporting affidavits, the same having not been presented before the trial court.
33. With regard to the second ruling whereby the trial court refused to adjourn the case further, it is important to note that a refusal to grant an adjournment is a discretionary decision. Whereas this court can revise discretionary decisions of the Magistrate's Courts, the same can only be done where it is proved that there is arbitrariness, perversity, error of law or fact, non-consideration of relevant materials or consideration of irrelevant ones in the impugned decision.
34. Courts are required to exercise discretion judiciously. In the present matter, the trial court record shows that the prosecution was given numerous opportunities to present its witnesses but applied for adjournments on most of the occasions. The Respondents gave the number of hearings that the matter was given to be 27. All this time, the Respondents have remained in remand custody. On 27th November, 2024, the trial was adjourned at the behest of the prosecution and the court was clear that the adjournment would be the last and a mutually convenient hearing date was fixed for 4th December, 2024. That notwithstanding, the prosecution again made two applications for adjournment on 4th December, 2024, which were refused.
35. It is important to note that the second application for adjournment was made on the ground that a witness was in Milimani Court. No reasons were given as to why appropriate diary management arrangements were not made or why the prosecution took that date as being convenient, only to apply to adjourn the matter.
36. The court, in my view, properly exercised its discretion to reject the application, noting that there were earlier orders for last adjournment and further noting that the court had earlier on the same day declined another application for adjournment. No arbitrariness, perversity, error of law or fact, non-consideration of relevant materials or consideration of irrelevant factors was proved and revision is therefore not available to the Applicant.
37. Having said so much, it is clear that this court cannot exercise powers of revision of the lower court's decisions as sought by the Applicants. The upshot is that the Applicants' motion by notice dated 16th December, 2024 lacks merit and is hereby dismissed.
38. I hereby direct that the trial court's file be placed before Hon. B. Ileri, (who has since taken over the conduct of the trial) on 30th October, 2025 for directions, so that the trial proceeds apace. The Respondents to be presented before the trial court on that date.



39. This file is hereby closed.

40. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 14TH DAY OF OCTOBER, 2025.

JOE M. OMIDO

JUDGE

For the Applicant: Ms. Muema.

For the Respondent: Mr. Adawo.

Court Assistants: Mr. Ngoge & Mr. Juma.

