



**Director of Public Prosecutions v Richard (Criminal Appeal E052 of 2024)
[2025] KEHC 17159 (KLR) (12 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E052 OF 2024
OA SEWE, J
NOVEMBER 12, 2025**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

KENNEDY ODHIAMBO RICHARD RESPONDENT

(Being an appeal from the Ruling of Hon. B. Toroitich, (RM) delivered on 25th June 2024 in Homabay Chief Magistrates' Criminal Case No. E147 of 2024)

JUDGMENT

- (1) This is an interlocutory appeal arising from the Ruling and Orders made on 25th June 2024 in Homa Bay Chief Magistrate's Criminal Case No. E147 of 2024: Republic v Kennedy Odhiambo Richard by Hon. B. Toroitich, Resident Magistrate. The brief background of the appeal is that, on 12th March 2024, the respondent, Kennedy Odhiambo Richard, was charged with the offence of assault contrary to Section 251 of the Penal Code. The particulars of the charge are that on 9th March 2024 at Koduogo village in Homa Bay County, the respondent willfully and unlawfully assaulted Jane Atieno Richard, thereby occasioning her actual bodily harm.
2. The respondent pleaded not guilty to the charge and the trial court thereafter commenced hearing of the case and heard three (3) prosecution witnesses. On the 25th June 2024, the appellant made an application for adjournment. This was the third such application in the matter and the trial court declined the application on the grounds that the appellant had depicted laxity in prosecuting the case.
3. The court observed that on 7th May 2024, the appellant applied for leave for the medical documents to be produced by the investigating officer under section 77 of the *akn ke act 1963 46 Evidence Act* on the ground tht the medical officer who conducted the examination was unavailable due to a medical practitioner's nationwide strike. When the matter came up on 23rd May 2024, the State informed the court that the accused was bereaved and unable to attend, and the hearing was rescheduled to 6th June



2024. On that date, the state indicated it was not ready to proceed, as the Investigating Officer and the doctor who were the remaining witnesses were absent. The matter was accordingly adjourned and fixed for further hearing on 25th June 2024.
4. On the basis of the foregoing the trial court also surmised that the prosecution was not keen to prosecute the matter. It held that further adjournments would only delay justice; hence the impugned ruling. The trial court accordingly declined the application in the interest of justice.
 5. Dissatisfied with the decision of the trial court, the appellant lodged the present appeal on the grounds that:
 - a. The trial magistrate failed to evaluate the proceedings on record in its entirety, leading to an order adverse to the appellant.
 - b. The trial magistrate erred in law in failing to consider the rights of the victim in ordering the appellant to close its case prematurely on account of expediency.
 - c. The trial magistrate erred in fact by failing to take note that the first 3 prosecution witnesses had been promptly availed for trial as directed from the onset on the 19th March 2021 and 11th May, 2024.
 - d. The trial magistrate failed to take judicial notice of national events at the time, such as the doctor's strike and the Anti Finance Bill protests that were constantly changing and that hindered the prompt production of prosecution witnesses specifically the medical officer and the investigating officer.
 - e. The trial magistrate erred in fact as there was no evidence of the prosecution being granted a last adjournment to warrant a claim of laxity on the part of the prosecution and since out of the last 3 adjournments granted, one was sought by the respondent on 23rd May 2024.
 - (6) Therefore, the appellant prayed that the appeal be allowed and that the Ruling and Order of the trial court dated 25th June 2024 be set aside.
 - (7) The appeal was urged by way of written submissions pursuant to directions given herein on 19th February 2025. The appellant's counsel filed submissions dated 25th February 2025, in which she explained that, upon delivery of the impugned Ruling, the appellant filed an application for revision vide Homa Bay HCCRREV E020 2024 under Section 362 of the Criminal Procedure Code; but a Ruling was made therein granting stay pending appeal. The appellant accordingly filed this appeal on 30th September, 2024.
 - (8) The appellant reiterated the factual basis of the appeal as borne out of the record of the lower court, noting that the accused had been released on bond on 14th March, 2024. The matter was thereafter fixed for hearing on 19th March, 2024, when it proceeded without delay and three prosecution witnesses testified. It was further pointed out that, around the same time doctors in the public health sector went on strike demanding the implementation of a 2017 labour agreement with the Government; a matter of public notoriety. Therefore, on the 7th May 2024, the Prosecution applied to have the Investigating Officer produce the P3 form, as it was uncertain when the strike would end. However, the strike ended unexpectedly on 8th May 2024, and it was then decided that the clinical officer would be best placed to testify.
 - (9) The appellant explained that, despite the end of the strike, the clinical officer was unavailable, despite having been served with both witness summons and police bond by the investigating officer. When contacted via telephone, he maintained that he was still on strike and declined to appear before



the court. Counsel explained that, although this information was communicated to the court, it was rejected. The trial court found it misleading and concluded that it was aimed at impeding the expeditious disposal of the lower court matter..

- [10] The appellant further explained that the matter was scheduled to proceed on 25th June 2024, which turned out to be the day of the “Gen Z” protests. In the circumstances, the investigating officer recalled for deployment to help maintain peace in Homa Bay town. This was reported to the court, and an adjournment was sought.
- (11) The appellant urged the court to note that, although in its first ruling on 25th June, 2024 the trial court stated that three adjournments had been sought by the prosecution since 7th May 2024, the record shows that one of those adjournments was made at the instance of the respondent for the reason that he was bereaved. The appellant also took issue with the fact that the court had not declared that it was granting a final adjournment due to concerns over delays. Counsel therefore argued that, by denying the appellant’s request and directing the closure of its case, the trial court disregarded the principles of fair hearing and the need to balance the rights of all parties in criminal proceedings.
- (12) Therefore, the appellant submitted that the closure of its case was premature and violated Articles 50(1) and 159 of *akn ke act 2010 constitution the Constitution*, which protect the rights of both accused persons and victims of crime. The premature closure, it was argued, undermined the court’s duty to safeguard the victim’s right to justice and due process. Further, the appellant contended that the doctor’s testimony was crucial to its case, and denying time for this evidence amounted to prejudice. The appellant relied on *Republic v Paul Mutuku Magado* [2019] eKLR, *Republic v Samuel Gathuo Kamau* [2016] eKLR and *Republic v James Kiarie Mutungei* [2017] eKLR as to the applicable principles pertaining to interlocutory criminal appeals.
- (13) The respondent has been acting in person in this appeal and was present on 19th February 2025 when directions for the filing of submissions were given. He specifically requested for two weeks to file his written submissions. He not only failed to file submissions but also opted to not attend court on the 26th March, 2025 when the matter came up for mention for further directions.
- (14) I have given due consideration to the Grounds of Appeal, the proceedings of the trial court as well as the appellant’s written submissions. The sole issue for determination is whether the trial court erred in rejecting the appellant’s application for adjournment and in directing the closure of the prosecution case without the testimony of the medical officer. In effect the appeal impugns the exercise of discretion by the trial court.
- (15) The general position as explicated in *Mbogo & Another v Shah* [1968]EA 93 at 96, is that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
- (16) In *Japheth Pasi Kilonga & 8 others v Mombasa Autocare Limited* [2015] KECA 585 (KLR) the Court of Appeal had the following to say:

“The single most drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in the overwhelming case backlog. Adjournment had been identified as the leading contributing factor to this. Lord Denning, MR in the oft-cited case of *Fitzpatrick v Batger & Co. Ltd* (1967) 2All ER 657 warned that;



“public policy demands that the business of the courts should be conducted with expedition.”

Like never before today this police is emphasized more as it is underpinned in *akn ke act 2010 constitution the Constitution*. Article 159(2) (b) & (d) enjoins courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities.

...

It is therefore possible for the court to demand expedition in the disposal of cases and do justice at the same time; balancing the scales of justice.

Whether the learned Judge properly or improperly declined to grant the appellant’s application for adjournment is a matter that goes to question the exercise of judicial discretion. That discretion is now firmly settled, should be exercised in a judicial and reasonable manner, upon proper material, after the court has considered in addition, the party’s overall conduct in the case and the sufficiency of the reasons for seeking adjournment...”

(17) I have also taken into account the principles set out in Paul Mutuku Magado (*supra*) where the court held:-

“whereas each application for adjournment depends on its own special circumstances, some of the common factors to guide a court in making a decision are:

- i. The length of time a case has taken undergoing hearing from the time the plea was taken;
- ii. Whether the accused person is out on bail bond pending hearing or if he she is in custody;
- iii. The number of applications for adjournment an accused person or the prosecution has made;
- iv. If the reasons given for adjournment are plausible;
- v. The commitment of the parties to have the case heard expeditiously;
- vi. If any exogenous factors have contributed to delay in the hearing of a case;
- vii. If new or additional compelling evidence has come to the attention of the prosecution or the accused person in the course of hearing the case; and
- viii. The nature of the charge and consequent sentence if an accused person was to be convicted.

(18) From the proceeding, I note that this is a 2024 matter in which three witnesses have already testified, leaving only the medical officer and the investigating officer. The appellant’s counsel explained the reasons for seeking adjournments, including the medical officer’s training in Kisumu, the doctor’s strike, and later the Gen Z protests.

(19) While this court appreciates the trial magistrate’s sense of responsibility in insisting that hearing of the case be proceeded with as scheduled, considering ought to have been given that the prosecution was ready and did proceed with three of its witnesses on the first hearing date; that of the three adjournments previously granted, one was granted at the instance of the respondent, that the



prosecution was keen and eager to proceed and therefore was prepared to have the Investigating Officer produce the P3 form; and that plausible reasons were given as to why the Investigating Officer was not available on the 25th June 2024 in that he was recalled to maintain peace during the Gen Z protests against the Finance Bill 2024.

[20] It is also significant that the case involved close relatives; and that justice to the victim required some measure of proportionality in a case where the accused person is out on bond. Taking into account all the foregoing factors, the scales of justice ought to have tilted in favour of adjournment; particularly given the circumstances that unfolded on the 25th June 2024 of which this Court takes judicial notice as a matter of public notoriety.

(21) I therefore find merit in the appeal. The same is hereby allowed and orders granted as follows:

- a. That the Ruling and Orders of Hon. B.K. Toroitich, RM, issued in Homa Bay Chief magistrate's Criminal Case No. E147 of 2024 on 25th June 2024, be and are hereby set aside as prayed
- b. That the prosecution's case be and is hereby re-opened for the hearing of the evidence of the medical officer and investigating officer as prayed.

It is so ordered.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER, 2025

OLGA O. SEWE, JUDGE

DATED AND COUNTERSIGNED AND DELIVERED THIS 12TH DAY OF NOVEMBER, 2025

