

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: NGENYE, JA. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E029 OF
2025

BETWEEN

REPUBLIC.....APPLICANT/APELLANT

AND

DANIEL LO COCO 1ST
RESPONDENT MASSIMO NATIVI.....2ND
RESPONDENT
RAFIKI LIMITED 3RD
RESPONDENT COSIMO ARMENO MODUGNO 4TH
RESPONDENT
MARIA GRAZIA MOSCONE.....5TH RESPONDENT
FLORENZO GIROLA.....6TH RESPONDENT
ROSSY TETAMANTI 7TH RESPONDENT
RITA NAPPO.....8TH RESPONDENT
CHIEF MAGISTRATES COURT, KILIFI 9TH RESPONDENT
THE HON. ATTORNEY GENERAL 10TH RESPONDENT

*(Being an application for leave to amend the Memorandum of
Appeal from the Ruling of the High Court of Kenya at Malindi
(Thande, J.) dated 28th April 2024*

in

Constitutional Petition No. E006 of 2024)

RULING

1. By a Notice of Motion dated 9th October 2025, the applicant is seeking in the main:

“a) That this Court be pleased to grant the appellant/applicant leave to amend its Memorandum of Appeal to reflect the correct case number of the matter in the lower court that gave

rise to the Petition before the High Court in Malindi Constitutional Petition No. E006 of 2025 in Kilifi Criminal Case No. E328 of 2024 instead of Kilifi Criminal Case No. E384 of 2024;

- b) That this Court be pleased to grant the appellant/applicant leave to amend its Memorandum of Appeal and change the name of the appellant from the Republic to Director of Public Prosecutions;***
- c) That this court be pleased to deem the amended Memorandum of Appeal annexed herewith as duly filed; and***
- d) That this Court be pleased to issue any other and/or further order as may be necessary to meet the ends of justice.”***

2. The application is supported by the grounds on its face and an affidavit of **Joseph Mwangi Kamanu**, a Principal Prosecution Counsel in the office of the Director of Public Prosecutions of even date. He deposed that this Court vide a ruling dated 12th September 2025, stayed the proceedings in Malindi High Court Constitutional Petition No. E006 of 2024, but with a rider that the appeal herein be heard within 60 days; that **Daniel Lo Coco and Massimo Nativi (the 1st and 2nd respondents respectively)** were the accused persons in Kilifi Criminal Case No. E328 of 2024; and that they filed the proceedings before the superior court which gave rise to the appeal proceedings before this Court.

3. Mr. Mwangi deposed that the already filed Memorandum of Appeal refers to **Kilifi Criminal Case No. E384 of 2024** while the correct citation ought to be **Kilifi Criminal Case No. E328 of 2024**, hence the need for the amendment so as to correct the typographical error; that the 1st, 2nd and

3rd respondents

herein sued the Director of Public Prosecutions (**the DPP**) who filed the Notice of Appeal dated 28th April 2025, but that the Memorandum of Appeal was by the Republic, and that, therefore, there is need to change the name of the appellant in the Memorandum of Appeal to that of the DPP; and that none of the parties will be prejudiced by the two amendments as it will not in any way change the grounds upon which the appeal is anchored, or the substratum of the appeal.

4. Opposing the application, the 1st, 2nd and 3rd respondents through the 2nd respondent, **Massimo Nativi**, filed a replying affidavit sworn on 24th October 2024. Mr Massimo deposed that the Republic was not a party to the proceedings in the superior court and, hence, it did not have the capacity to file the present appeal as there were no orders made against it; that, although the Memorandum of Appeal dated 12th May 2025 and the Record of Appeal were filed by the Republic, they were both signed by the Principal Prosecution Counsel for the DPP; that the DPP is not a party in this appeal or in the instant application; and that, therefore, he had no capacity to make any application.
5. It was also deposed that an appeal that is filed by a person who was not a party in the superior court proceedings and one who has not filed a Notice of Appeal, is incompetence; that the incompetence cannot be cured by the proposed amendments to the Memorandum of Appeal; that learned Prosecution Counsel was within time on 28th April 2025 to file a competent Memorandum and Record of Appeal in the DPP's name but, instead, sought to justify the filing of the appeal and the application in the name of the Republic.

6. The 2nd respondent contended that it filed an application dated 30th May 2025 seeking to strike out the instant appeal which it was directed be heard together with the instant appeal; that after taking the directions, the DPP filed the instant application seeking to amend the Memorandum of Appeal so as to plead the correct name of the appellant; that after the DPP abandoned the Notice of Appeal, the responsibility of filing the appeal could not be delegated to the Republic; and that, accordingly, the Memorandum and Record of Appeal dated 12th May 2025 and lodged on 17th May 2025 are unconstitutional, and null and void.
7. The 2nd respondent deposed that grounds 3 and 4 of the Memorandum of Appeal which refer to an error which the learned Judge made by barring the Inspector General of Police, the Director of Criminal Investigations and one David K. Siele from investigating the 1st and 2nd respondents, are incompetent as there is no Notice of Appeal or any appeal for that matter filed by the Attorney General; that, furthermore, the Republic cannot file an appeal against the Chief Magistrate and the Attorney General who ought to be represented by the Attorney General himself/herself; and that the glaring unconstitutional failures and shortcomings cannot be cured by the proposed amendment which is intended to change the identity of the appellant.
8. According to the 2nd respondent, the remedy is for the Republic to withdraw the appeal for want of competence since the DPP had time upto 29th September 2025 to file the Record of Appeal in his name, but that, instead, he

abandoned the Notice of

Appeal; and that, in any event, the time to file the Record of Appeal by the DPP has already lapsed.

9. On behalf of the 4th, 5th, 6th, 7th and 8th respondents, **Rita Nappo, the 8th respondent** filed a replying affidavit sworn on 30th October 2025 in support of the application. The replying affidavit seems to be in response to the application filed by the 1st - 3rd respondents dated 30th May 2025 which sought to have the appeal stuck out on the ground that the applicant herein was not a party to the petition in the superior court. I was unable to locate any replying affidavit filed by the 4th, 5th, 6th, 7th and 8th respondents in the record as put to me in response to the present application. A scrutiny of the averments in the replying affidavit of 30th October 2025 clearly shows that it speaks to the importance of the role of the DPP in the impugned constitutional petition and, as such, I do not see their (averments) relevance to the instant applicant. Be that as it may, at the hearing, learned counsel for the parties, Mr Ndegwa, orally highlighted their written submissions which I will revert to shortly hereafter.
10. At the virtual hearing on 3rd November 2025, learned State Counsel **Mr. Mwangi** appeared for the applicant and held brief for learned counsel **Mr. Ojwang** for the 9th and 10th respondents, learned counsel **Mr. Kinyua** appeared for the 1st to 3rd respondents while **Mr. Ndegwa** appeared for the 4th to 8th respondents. All counsel relied on respective parties' written submissions which they also highlighted. Those of the applicant are dated 24th October 2025; of the 1st to 3rd respondents 31st October 2025; and of 4th to 8th respondents 30th October 2025.

11. Mr. Mwangi submitted that the application seeks to amend the name of the appellant in the Memorandum of Appeal from Republic to DPP since the DPP was the 1st respondent in the Malindi High Court Constitutional Petition No. E006 of 2024; that since he (the DPP) filed the Notice of Appeal dated 28th April 2025, it is only proper, and for uniformity of pleadings, that the DPP is substituted for Republic as the appellant in the Memorandum of Appeal; and that the omission was a mere oversight, and if corrected will not occasion any prejudice to any party.
12. The second amendment as urged was occasioned by a typographical error in relation to the citation of the serial number in criminal case in the trial court. Counsel submitted that the Memorandum of Appeal referred to Criminal Case No. 384 of 2024 instead of Criminal Case No. 328 of 2024; and that the amendments will not change the trajectory or the substratum of the appeal.
13. In support of the application, and in highlighting the submissions dated 30th October 2025, Mr Ndegwa reiterated that the intended amendments will not change the substratum of the appeal; that the application seeks to rectify an apparent error which, if corrected, will leave parties as they were before without any prejudice; that the office of the DPP is established under **Article 157** of the **Constitution**, and is conferred with exercising powers pursuant to **Article 1(1), (2) and (3)** which underpins that sovereign power belongs to the people; that **Article 4** establishes Kenya as a sovereign Republic, thereby affirming the Sovereign doctrine and, subsequently,

declares a

Republic; that the powers conferred therein are what the DPP was executing while prosecuting the 1st and 2nd respondents under **Article 157** of the **Constitution**; and that there is no power which can be exercised by a person or body or authority other than the power conferred upon such person or body or authority by the Constitution.

14. Mr Ndegwa further submitted that **Sections 4** and **5** of **The Office of the Director of Public Prosecutions Act** provides for the principles and values which guide the DPP in commencing proceedings, which power should only be exercised in the interest of the public; that the mere semantics of misstating the Republic instead of the DPP in the Memorandum and Record of Appeal do not go to the root of the appeal; that **Section 3** of the **Judicature Act, Cap 8** which provides for the manner of exercise of jurisdiction of courts in Kenya underpin that *common law, the doctrines of equity and the statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary*; that, therefore, given the powers that are conferred upon the DPP by the Constitution, it matters not whether the name Republic or DPP is indicated to be the appellant; and that, had it not been for **Article 157 and Section 3** of the **Judicature Act**, criminal proceedings can even be commenced in the name of individuals; and that, either way, whether commenced by an individual or by the DPP, criminal proceedings would still be properly before a court.

15. Opposing the Motion, Mr Kinyua for the 1st - 3rd respondents submitted that the DPP was the applicant in Civil Application No. E026 of 2025, which was an application seeking to stay the proceedings in the High Court; that he (Mr Kinyua) in that application argued in vain that the DPP could not apply to stay proceedings while he had not filed an appeal against the same proceedings; that filing the Record and Memorandum of Appeal in the name of the Republic was not a typographical error since after the DPP filed a Notice of Appeal, he was obliged within 60 days to file the Record of Appeal and Memorandum of Appeal in his name, and that he was within time to do so; that he (Mr Kinyua) filed a Preliminary Objection and a Notice of Motion dated 30th May 2025 seeking to strike out the appeal on the ground that the Republic was not a party in the court below, having not filed a Notice of Appeal; that, therefore, the Court did not have jurisdiction, not just to hear the instant application, but also the pending appeal.
16. Mr Kinyua submitted that **Rule 85(1)** of this **Court's Rules, 2022** provides for circumstances under which a Notice of Appeal is deemed as withdrawn; that in this instant, the same was deemed to have been withdrawn when the Record and Memorandum of Appeal were not filed within the stipulated timelines; that for this reason, this Court had no jurisdiction to hear the instant application; that for all intent and purposes, the instant application is one for substitution of a party disguised as an application for amendment; that, even if the application for substitution is allowed, it would still serve no purpose since there is nothing to substitute, the Record of Appeal having

been served on 4th August 2025 which was out

of time; and that there is no application on record for extension of time to serve the Notice of Appeal out of time.

17. Counsel urged us to take judicial notice of the fact that under **Article 260** of the **Constitution**, there is no public or State organ that is known as the Republic.
18. Finally, counsel submitted that he had no objection to the amendment of the serial number of the criminal case pending in the Chief Magistrate's Court at Kilifi.
19. I have considered the application, affidavit in support thereof, the replying affidavit in opposition to the application, the respective parties' rival oral and written submissions and the applicable law. The singular issue that falls for determination is whether I should exercise my discretionary powers to allow the proposed amendments to the Memorandum of Appeal, first to replace the name 'Republic' with that of the 'DPP' as the appellant and to correct the serial number of the criminal trial case to Kilifi Criminal Case Number E328 of 2024 instead of Kilifi Criminal Case Number E384 of 2024.
20. At the outset, I wish to state that learned counsel Mr. Kinyua conceded to the amendment to correct the criminal trial case number. Hence, there is nothing that falls for me to delve into in this respect.
21. **Rule 46(1)** and **(2)** of this **Court's Rules, 2022** provides for applications for leave to amend as follows:

**46. (1) Whenever a formal application is made to
the Court for leave to amend a
document, the**

amendment for which leave is sought shall be set out in writing and—

(a) if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or

(b) if it is not practicable to lodge the document with the Registrar, handed to the Court and to the respondent at the time of the hearing.

(2) Where the Court gives leave for the amendment of a document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is so specified, then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.

22. In the case of Kenya Hotels Limited vs. Oriental Commercial Bank Limited (2018) KECA 692 (KLR), it was observed that:

“It is trite that the power reserved for the Court by rule 44(1) of the Court of Appeal Rules to amend any document is a discretionary power. Like all judicial discretion however, it must be exercised judiciously and upon reason, rather than arbitrarily, on humour, or fancy. (See Kanawal Sarjit Singh Dhim v. Keshavjivraj Shah [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. (See

Uhuru Highway Development Ltd v. Central Bank of Kenya [2002] 1 EA 314).”

23. In the case of **Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others vs. Assets Recovery Agency (2022) KECA 48 (KLR)** (Okwengu JA.), held that:

“.... the power to amend a document under Rule 44 of the Court Rules is discretionary. This means that the Court must exercise the power of amendment judiciously by granting leave to amend only where it is in the interest of justice based on the circumstances before the Court. In particular, the Court has to take into account the nature and extent of the amendment, and whether it will assist in the just determination of the real questions in dispute between the parties. On his part the applicant must demonstrate that the application is brought in good faith and also place before the Court facts that would justify the court acting in its favour.”

24. As observed above, the power to amend under **Rule 46(1)** and **(2)** is discretionary, and should be exercised judiciously and based on good reasons. In exercise of such powers, a court should also take into consideration the circumstances of each case as no case is similar to the other. A court in granting amendment must be driven by doing substantive justice and serving the interests of all parties. The amendment must at the end of the day aid the court in making a just determination of the issues in dispute. Conversely, the applicant must demonstrate that the amendment is brought in good faith, and has been sought without undue delay as was held by this Court in ***Kyalo vs. Baysuf Brothers Ltd (1982) KECA 34 (KLR)***. That is to say that the amendments of pleadings should be allowed if brought within reasonable time.

25. Putting to mind the above principles, the first issue to address myself to is whether I have jurisdiction to order amendment of a Memorandum of Appeal. Simply stated, is a Memorandum of Appeal a pleading for purposes of a record of appeal before this Court? The answer is in the affirmative. This is so because, the primary documents which are to be included in the preparation of the record of appeal under **Rule 64(2)** are not to be subjected to amendments of any kind, of which a Memorandum of Appeal does not form part of the primary documents listed thereunder. This has previously been subject of determination by this Court. In **Uhuru Highway Development Limited vs Central Bank of Kenya & 7 Others (2002) KECA 219 (KLR)**, R.S.C. Omolo, JA. held in part:

“What is sought to be amended is the memorandum of appeal. This Court has repeatedly ruled that primary documents cannot be amended and primary documents, as far as I understand the position, are such documents which cannot be brought into the record of appeal by way of a supplementary record. Rule 85 (1) (a) to (k) lists all the documents which are to be included in a record of appeal...So that a memorandum of appeal cannot be treated as a primary document in the sense I have tried to explain herein. Accordingly, a memorandum of appeal, subject to the interests of justice, is always amenable to amendment.”

26. It is common ground that the amendments being sought are specifically intended to change the name of the appellant from ‘Republic’ to ‘Director of Public Prosecutions’

and to rectify the citation of the criminal case in the lower court from Kilifi

Criminal Case No. 384 of 2024 instead of Criminal Case No. 328 of 2024. As highlighted earlier, the latter proposed amendment was conceded by Mr. Kinyua, counsel for the 1st - 3rd respondents.

27. It is undisputed that it is the DPP who filed the Notice of Appeal dated 28th April 2025, seeking to appeal against the ruling of the High Court of Kenya at Malindi (**Thande, J.) Constitutional Petition No. E006 of 2024- Daniel Lo Coco & 2 Others vs. Director of Public Prosecutions & 10 Others**). The position taken by the applicant, which has also been supported by the 4th - 8th respondents is that the name 'Republic' was written by mistake, thus being a typographical error.
28. On the part of the 1st - 3rd respondents, they contend that the DPP had time to file a proper appeal, but that he did not seize that opportunity, hence under **Rule 85 (1)**, the Notice of Appeal should be deemed as withdrawn. Mr Kinyua stated that there was on record an application dated 30th May 2025 seeking to strike out the Record of Appeal on account of it being filed out of time, consequent to which this Court had no jurisdiction to hear this application. I shall revert to this issue later on in this ruling.
29. The nature and the extent of the amendment is limited to rectifying the name 'Republic' to 'DPP'. **Article 159 (2) (d)** of the **Constitution** requires that courts to administer justice without undue regard to technicalities and formalities. Further, I am enjoined under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** to dispense justice with the sole

purpose of realising expeditious, proportionate and affordable resolution of disputes. The two sections provide as follows: **3A. Objective of Act**

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

3B. Duty of Court

For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient use of the available judicial and administrative resources;

(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) the use of suitable technology.

30. It is clear that the applicant is not introducing new and

substantive grounds of appeal. He is also the party who sought to confer the Court with jurisdiction to hear and determine the

appeal having filed the Notice of Appeal. Clearly then, he is the party who owns the appeal. I have no reason not to be convinced in such circumstances that the error in misstating the name of the intended appellant, the DPP, in the Memorandum of Appeal was an oversight, which the applicant has codified by use of the phrase 'typographical error'. An oversight is an unintentional failure to notice or do something, which we are all prone to. That being the case, and noting that the application has been brought within a fairly reasonable time, I do not see what prejudice will be suffered by any of the parties if the amendment to rectify the name of the intended appellant to read DPP is allowed as prayed.

31. Taking to mind that the Court should be focussed on doing substantive justice, it is trite that the appeal is in its initial stages of both preparation in readiness for hearing. The most critical principle to adhere to is to ensure that all parties are accorded a fair platform to ventilate their respective cases. To me, the proposed amendment serves substantive justice so that there exists uniformity in referencing the parties.
32. As regards the pending application by counsel for the 1st to 3rd respondents seeking to strike out the Record of Appeal for want of service on time, remains a matter for determination in another forum. Furthermore, it was submitted that directions were issued that that application would be heard alongside the main appeal. It is therefore not an issue that would derail the Court, sitting as a single judge, to hear the instant application. Instead, the hearing and determining this application expeditiously clears the

way for the appeal and the aforesaid application dated 30th
May 2025 to be heard. I have done the

best I could to ensure that this ruling is delivered within the shortest time so that it does not derail the hearing of the appeal. For these reasons, I find and hold that no prejudice will be occasioned to the 1st and 3rd respondents if this application is allowed.

33. In the same vein, I am hesitant to comment on the merit or other otherwise of the grounds of appeal. Whether the appeal is meritorious in some or all of the grounds of appeal, is a matter for determination by the full bench.

34. In conclusion, I find that the applicant's Notice of Motion dated 9th October 2025 is merited and the same is hereby allowed as follows:

- a) The Applicant be and is hereby granted leave to amend the Memorandum of Appeal dated 12th May 2025;**
- b) The applicant's draft Memorandum of Appeal dated 9th October 2025 be and hereby deemed as duly amended;**
- c) The applicant do serve the draft Amended Memorandum of Appeal dated 9th October 2024 within 7 days from the date of this ruling; and**
- d) That costs shall be in the appeal.**

35. Orders accordingly.

Dated and delivered at Mombasa this 21st day of November, 2025.

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR