



**Director of Public Prosecutions v Nganga (Criminal Revision Application E008 of 2025)
[2025] KEHC 17992 (KLR) (Anti-Corruption and Economic Crimes) (3 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 17992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL REVISION APPLICATION E008 OF 2025**

LM NJUGUNA, J

DECEMBER 3, 2025

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

PHILIP MACHARIA NGANGA RESPONDENT

RULING

1. The applicant herein has moved this court by way of the Notice of Motion dated the 11th September, 2025 brought under Article 165(6) & (7) of *the Constitution* and Section 362 and 364 of the Criminal Procedure Code Cap 75 Laws of Kenya. The application is premised on the grounds on the body of the same, and it is supported by the annexed affidavit sworn by Borris Ongeto, on even date.
2. Through the application, the applicant has sought the following Orders:
 1. Spent.
 2. That this Honourable court be pleased to call for and examine the record of the proceedings in Milimani Anti-Corruption Case No. E026/2025 Republic Vs Phillip Macharia Nganga for the purpose of satisfying itself on the correctness, legality or propriety of the ruling delivered by Hon. Zipporah Gichana on 11th September, 2025.
 3. That the court be pleased to review, vary, reverse and/or alter the orders relating to Milimani Anti-Corruption Case No. E026/2025 Republic Vs Phillip Macharia Nganga and reinstate the prosecution case permitting the prosecution/applicant herein to continue with its case and the same be heard on merit.



3. The applicant's case is that Anti-corruption case number E026/2025 (R vs Philp Macharia Nganga) was instituted on the 22nd May, 2025 in which the accused person was charged with three counts of receiving bribes contrary to Section 6(1) (a) of the Anti-*Bribery Act* No. 47 of 2016.
4. That after pre-trial directions, the court slated the case for hearing on 9th, 11th and 22nd of September, 2025. That when the matter came up on the 9th September, 2025 the prosecution sought an adjournment on the ground that the prosecution counsel was attending to a patient in Hospital whereof the court obliged with a rider that the matter would proceed on the 11th September, 2025.
5. The applicant states that on the 11th September, 2025 Joseph Mwangi, the complainant in this matter and one Martin Mbuvi were present in court after having been duly bonded to testify on the 11th September, 2025. However, when the counsel holding brief arrived in court around 9.50 a.m. the court was just ending the session as he walked and settled in court and despite his presence, the court went ahead and concluded the session and the trial Magistrate left the courtroom.
6. That upon the counsel perusing the court file, he was surprised that the trial Magistrate had dismissed the case under Section 206 of the Criminal Procedure Code notwithstanding the availability of two witnesses in court as well as the investigating officer, which was in clear breach of Sections 3 and 4 of the Magistrate's Courts Act and Article 159 (2) (d) of *the Constitution*.
7. The respondent filed a replying affidavit which he swore on the 15th October, 2025. He states that he was arrested on the 22nd May, 2023 by the officers of the EACC on allegations of receiving a bribe of Ksh. 20,000 which charges he denied and on the same day, he was released on cash bail pending investigations.
8. That the said investigations took two years to complete and the delay was never explained to him which is contrary to the principle that justice delayed is justice denied. That when the matter came up for pre-trial directions on the 30th June, 2025, the prosecution made an application for the matter to be heard on three consecutive days due to the number of witnesses, and by consent of the parties the matter was fixed for hearing on the 9th, 11th and 22nd of September, 2025. That on the 9th September, himself and his advocate appeared physically in court and the court did not have any other matter on the cause list for that day.
9. On the said date, the Prosecution made an application for adjournment and the counsel who was holding brief for the ODDP informed the court that the prosecutor handling the matter was visiting someone in Hospital. That the court after hearing the parties ruled in favour of the prosecution and adjourned the matter and parties agreed to proceed on the 11th September, 2025 physically in court. The prosecution was advised to have all the witnesses present and the court indicated that the matter was to commence at 9.00 a.m.
10. That himself and his advocate arrived in court at 9.00 a.m. on the said date and at 9.15 a.m. they were informed that the Honourable Magistrate was waiting for the prosecutor in order to commence the proceedings. That at 10.00 a.m. which was one hour after the time the matter was scheduled to start, the court commenced and there was no appearance for the Prosecution even after the matter was called out.
11. That no evidence was placed on record to show that the complainant or the other witnesses attended court on that day and in the circumstances, his advocate made an application to have the matter dismissed. The Honourable Magistrate proceeded to dismiss the case and directed that the cash bail be refunded to him. He states that the allegation that the prosecutor arrived at 10.00 a.m. only to find the Honourable Magistrate finalizing her ruling is untrue.



12. He avers that it is interesting that the prosecutor was in court but could not introduce himself to the court even after arriving late as alleged. Further, that even if the averments were true which is denied, the court must ask itself why a prosecutor holding brief would arrive in court at 10.00 a.m. while the cause list had clearly indicated 9.00 a.m.
13. That the instant application is frivolous, vexatious and intended to waste court's time and that the conduct of the prosecution and the witnesses cannot be covered by Article 159(2) of *the Constitution* as it was not a mere technicality. Further, that Article 50(2) of *the Constitution* requires the Honourable court to conduct the hearing without unreasonable delay and expeditiously.
14. The applicant filed a Supplementary affidavit sworn on 22nd October, 2025 and annexed the ruling that was delivered on the 11th September, 2025.
15. The application was disposed of by way of written submissions.

Applicant's Submissions

16. The applicant isolated five issues for determination by the this Honourable court;
 - a. Whether the dismissal of the applicant's case was proper in light of the facts and circumstances of the case
 - b. Whether the applicant stands to suffer prejudice by reason of its case being dismissed prematurely on the basis of a legal technicality
 - c. Whether the prosecution availed witnesses in court for the purpose of the hearing on the material date when the case was dismissed
 - d. Whether the learned Magistrate's action of dismissal of the applicant's case was in contravention of existing provisions of the law and legal authorities governing dismissal of cases for reason of no-attendance of witnesses
 - e. Whether the applicant's application, satisfies the threshold for granting of the orders prayed for, and therefore fit to be granted.
17. On the 1st issue, it was submitted that the dismissal was not done in good faith as the learned trial Magistrate was aware of the whereabouts of the prosecution counsel who was held up in another court with leave that had been granted by the Honourable Magistrate. That the court understood the facts and the circumstances bedeviling the applicant's counsel on record, and had granted him time to be able to mention cases in other courts before he could revert back to handle this specific case. That the principle of natural justice requires that a party should not be condemned unheard.
18. On the second issue, the applicant averred that it is gravely prejudiced by the learned Magistrate's action of dismissing its case based on unwarranted, misconceived and misconstrued ground of non-attendance on the part of the applicant and its witnesses. That it was not given a fair opportunity of hearing, contrary to the requirements of *the Constitution* and the known principles of natural justice.
19. On the 3rd issue, the applicant contended that when its case was dismissed, there were two witnesses present in court who had been bonded to attend court and testify. That in addition, the investigating officer was also present but the Learned Magistrate being aware of this fact, ignored and went on to end the session even after seeing the counsel holding brief for the applicant's counsel enter the courtroom.
20. On the 4th issue, the applicant relied on the Provisions of Sections 144(1) and Section 202 of the Criminal Procedure Code and attached copies of bonds to attend court which were duly served upon,



and acknowledged by the two witnesses who attended court on the material day in compliance of the court summons and were ready to testify. Further, that shortly before the court session began, the court had been notified that the two witnesses and the investigating officers were in court and ready to testify and therefore, the learned Magistrate's action of dismissing the case was in contravention of the requirement of Section 202 of the Criminal Procedure Code and she failed to exercise her discretion in a judicial manner. Reliance was placed on the case of *Route 3 Company Limited & Gospel Celebration Centre versus Nairobi City County & Reuben Njuguna* (Civil appeal 188 of 2019) and that of *CMC Holdings Limited Vs James Mumo Nzioka* (2004) KLR 173.

Respondent's Submissions

21. The respondent identified the following issues for determination;
 - a. Whether the learned Magistrate action to dismiss the applicant's case under section 206 of the Criminal Procedure Code was proper
 - b. Whether the Learned Magistrate's action to dismiss the charges for want of prosecution was proper
 - c. Whether the dismissal of the applicant's case was proper in light of the circumstances
 - d. Whether the applicant has satisfied the threshold for granting the orders prayed for.
22. On the 1st issue, the respondent relied on Section 206 of the Criminal Procedure Code and submitted that based on the evidence and facts on record, the learned Magistrate followed the law by dismissing the charges. He reiterated that neither the prosecution witnesses nor the prosecutor was in court on the said date when the court made the order dismissing the charges.
23. On the 2nd and 3rd issues, he submitted that in circumstances where there is no attendance by the prosecution, the complainant and the witnesses on the day of the hearing, the court is left with no option but to dismiss the charges for want of prosecution and therefore, the dismissal of the charges was not a mere technicality under Article 159 (2) of *the Constitution* as has been submitted by the applicant. The respondent has asked the court to be fair and not to reward the prosecution's laxity in prosecuting matters in court.

Analysis and Determination

24. The court has considered the application and all the material placed before it, including the submissions. In my considered view, the only issue for determination is whether the applicant's application has met the threshold for granting of the orders sought herein.
25. The applicant herein has moved this court for review of orders that were made on the 11th September, 2025 in Milimani Anti-Corruption Case No. E026 of 2025 and reinstate the Prosecution's case and the same be heard on merits.
26. The respondent was charged with three counts of receiving a bribe contrary to Section 6(1) (a) of the Anti- *Bribery Act* No. 47 of 2016.
27. When the case came up for pre-trial on the 30th June 2025 the court slated the case for hearing on 9th, 11th and 22nd September, 2025. On the 9th September, 2025, the Prosecution sought for an adjournment and the same was granted.



28. On the 11th September, 2025, the respondent and his counsel attended court on time and when the matter was called out at 9.40 a.m., the prosecution and its witnesses were not in court and counsel for the respondent applied to have the case dismissed under Section 206 of the Criminal Procedure Code.
29. The court has perused the record of the proceedings for the 11th September, 2025 and the short ruling that was delivered by the learned Magistrate after she heard the oral application for dismissal of the case by counsel for the respondent. The record shows that the case was called out at 9.40 a.m. and the Prosecutor was absent. The Learned Magistrate has noted that there were no witnesses present on that day.
30. The applicant has maintained that the witnesses were in court including the investigating officer but the court record shows otherwise. It has also maintained that there was a prosecution counsel who was holding brief and that he arrived in court at 9.40 a.m. when the court was just ending its session as he walked and settled in court. If this was the case, there is no reason why counsel did not address the court to register his/her presence before the court could end the Session.
31. This court takes judicial notice of the official time when court sessions are supposed to commence which is 9.00 a.m. unless the court has given directions to the contrary. On the material day, the session started at 9.40 a.m. which is much later than the 9.00 a.m. official time. Even assuming that there was a counsel who had been sent to hold brief by the Prosecution, there would have been no justification for him to arrive in court past 9.00 a.m. and in this case after 9.40 a.m.
32. Further, from the proceedings of the 11th September, 2025 the court has noted that the respondent herein was arrested in 2023 when the crime was allegedly committed. The EACC took two years to bring him to court and no explanation was given for that delay. When the matter came up in court on the 9th September, 2025 it was the applicant who was not ready to proceed, yet, during the pre-trial directions, the court had cautioned that the prosecution was required to avail witnesses on the time and dates set for hearing of the case in a manner that is mindful of the time allocated and the interest of justice.
33. The accused person is entitled to a fair hearing under Article 50 of *the Constitution* and in particular, to have the trial begin and conclude without unreasonable delay and the conduct of the prosecution on the material day was in breach of the respondent's said right.
34. In the circumstances, and for the reasons that the court has given herein above, I find that the application has no merits and the same is hereby dismissed.
35. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 3RD DAY OF DECEMBER, 2025.

.....

L.M. NJUGUNA

JUDGE

In the presence of:- _

Mr. Mong'are for the Applicant

Mr. Gatoto for the Respondent

Court assistant – Adan

