



**Wamalwa v Bushuru alias Robert & another (Criminal Case  
E040 of 2022) [2025] KEHC 17660 (KLR) (1 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 17660 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E040 OF 2022  
AC BETT, J  
DECEMBER 1, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JULIUS OBWONYA BUSHURU ALIAS ROBERT ..... 1<sup>ST</sup> ACCUSED**

**ISAAC WAMALWA ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The Accused/Applicants filed a Notice of Motion application dated 17<sup>th</sup> June 2025 through their Counsel seeking the following orders:-
  - a. That this Honourable Court be pleased to issue a declaration that the Information dated 26<sup>th</sup> September 2022 is fatally defective, having failed to disclose the time, manner, or means by which the 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons are alleged to have caused the death of the deceased.
  - b. That the said information be struck out or quashed for violating section 134 of the Criminal Procedure Code and infringing the constitutional rights of the 1<sup>st</sup> and the 2<sup>nd</sup> accused person to a fair trial as couched in Article 50 (2) (b).
  - c. That the 1<sup>st</sup> and the 2<sup>nd</sup> accused person be forthwith discharged from these defective proceedings and set at liberty, unless otherwise lawfully charged afresh.
  - d. That in the alternative, the information dated 26<sup>th</sup> September 2022 be amended to include the time, manner, or means by which the 1<sup>st</sup> and 2<sup>nd</sup> accused persons are alleged to have caused the death of the deceased, to afford the Accused persons a fair chance at preparing and prosecuting their defence.
2. In support of the application, the first Accused, Julius Bushuru filed an affidavit in support of the application where he deponed that the charge was founded on the information dated 26<sup>th</sup> September



- 2022 filed by the prosecution to which he and his co-Accused/Applicant had pleaded not guilty and during the process of preparing for their defence, their new Counsel had an opportunity to review the information and case only to find that the information was defective as it failed to disclose the time, or manner in which the deceased was allegedly killed.
3. They averred that the particulars omitted were critical as it would hinder them in preparing their defence hence compromising their right to fair trial guaranteed under Article 50 (2)(b) of *the Constitution*. They further stated that it violates Sections 134 and 137 of the Criminal procedure Code they stand to be prejudiced given the serious nature of the offence. They assert that the statements and evidence do not cure the defect, as they are vague and contradictory and cannot substitute for the legal requirements of an information.
  4. They further averred that since the prosecution had already closed its case, it was upon them to defend their case. However, without the precise information of when and at what time the offence is alleged to have occurred, they were at risk of being seriously prejudiced. They referred to Section 137 of the Criminal Procedure Code, which states that such an objection must be made before the close of the prosecution's case and urged that courts have made exceptions where the defect is substantive and affects the validity of the charge. They contend that an objection can be raised at any stage, as the defect goes to the root of the matter. Thus, this court has the jurisdiction to entertain the application at any stage of the proceedings.
  5. According to the Accused/Applicants, if the defective information is not addressed, they will suffer an unjustifiable conviction, which will lead to a substantial miscarriage of justice and, as such, a waste of judicial time and resources.
  6. They pray that the application be heard and determined on a priority basis as it was made in good faith and in the interest of justice to ensure that the trial process is constitutional and procedurally fair.
  7. The prosecution filed its grounds of opposition dated 28<sup>th</sup> July 2025, stating that the law in framing of charges is a matter of form and not a question of substance, and as such, the Accused/Applicants have not demonstrated how they stand to be prejudiced by how the charges had been framed. They noted that the application was filed after the prosecution had closed the case and the court had pronounced that they had a case to answer.
  8. The prosecution noted that at plea taking, the Accused persons never expressed difficulties in understanding the charges when it was read to them, and further that they had an Advocate on record who represented them and even had an opportunity to cross-examine the witnesses in line with the charges they were facing.
  9. They aver that the application lacks merit and, as such, ought to be dismissed.
  10. Upon this court's direction, the application was canvassed by way of written submissions,

### **Applicant's Submissions**

11. In their submissions dated 28<sup>th</sup> July 2025, the Applicants assert that the procedure was not a matter of form but justice since the right to fair trial is enshrined under Article 50 of *the Constitution*. They contend that the information is the foundation of the prosecution's case, and if it is vague and unclear, it renders the case unstable and undermines its support for a trial. The Applicants support their claim with Sections 134 and 137 of the Criminal Procedure Code and state that the charge as framed, would prejudice them, as they would be unable to prepare their defence properly.



12. The application raises two issues for determination. On the first issue of whether the information dated 26<sup>th</sup> September 2022 was fatally defective for failing to disclose the time and manner which the alleged offence was committed, they place the responsibility on the State, affirming that they were responsible to inform the Accused persons in a clear and precise manner of the charges they are facing and as such if the charge is defective, they are unable to put up a defence. In support of their claim, they cite the cases of Republic vs. Dennis Mutuku Mwololo [2015] eKLR and Juma & others vs. Attorney General [2003] KLR 143.
13. According to the Accused/Applicants, the prosecution's case is marred with material inconsistencies, which go to the root of the case, as the information fails to disclose the time of death of the deceased and how the death occurred, and that failure by the prosecution to give detailed information renders the charge vague.
14. They submit that given the nature of a capital offence, the precision of the details is paramount and in support quote the case of Republic vs. Kibet [2025] KEHC 437 (KLR) where the court noted the danger of inconsistencies in the prosecution's case. They assert the need to have the Accused persons be informed of the nature of charges leveled against them so that they can put up a proper defence.
15. They also aver that a charge with defective information cannot be cured through evidence as was held in the case of Kariuki vs. Republic [1984] KECA 79 (KLR), and contend that where a charge fails to meet the statutory and Constitutional threshold, the immediate remedy is to quash it as the trial process is fatally defective and flawed for it denies the Accused persons a chance to defend the case against them.
16. In the alternative, they pray that the court directs an amendment of the information so that it is in line with the requirements under Section 137 of the Criminal Procedure Code and Article 50 (2)(b) of *the Constitution*.
17. In conclusion, they pray that this court finds the information fatally defective and orders it be struck out or quashed and they be discharged and set at liberty.

### **Respondent's Submissions**

18. In opposition to the issues raised by the Accused persons' Counsel, the Prosecution, while arguing on when a charge is considered defective, quotes various supporting cases, including the case of Gombo vs. Republic [2023] KEHC 22994(KLR) and Republic vs. Mackenzie alias Mtumishi alias Nabii alias Papaa [2024] KEHC 5792 (KLR).
19. They urge the court to dismiss the Accused persons' claim that the charge sheet did not indicate a date, stating that it was clearly shown in the charge sheet. On the claim that the manner and means of how the offence was committed were not disclosed, they contend that the evidence by the prosecution indicates that the two Accused had assaulted the deceased, thereby causing his death.
20. The prosecution asserts that charges were read out to the Accused persons, who, in spite of having a Counsel from the beginning, took a plea of not guilty, and the trial commenced. Throughout, the Accused persons' Counsel, who had the opportunity to raise objections, proceeded and even cross-examined the witnesses, indicating that both the Accused persons and their Advocate were fully aware of the charges.
21. They deny the allegations that the Charge Sheet is defective and if so, they state that Section 214 of the Criminal Procedure Code allows for any amendments and alterations to be made by the Prosecution before closing its case. However, as it stands they affirm that they had already closed the case after which the court made a ruling that the Accused persons had a case to answer and as such the application



was made too late. They opine that the court can invoke Section 382 of the Criminal Procedure Code if there is a defect in the Charge Sheet, provided it does not vitiate the evidence and does not cause prejudice to the Accused persons.

22. They finally submit that the application lacks merit and should be dismissed.

### **Analysis and determination.**

23. I have had an opportunity to peruse the court's record, the application, the response by the Prosecution, and both parties' submissions.

24. The charge sheet, which is dated 23<sup>rd</sup> September 2022, is the main issue of contention and reads as follows:-

“Charge: Murder contrary to section 203 as read with section 204 of the penal code.

Particulars: JULIUS OBWONYA BUSHURU Alias ROBERT BUSHURU and ISAAC WAMALWA; on the 14<sup>th</sup> September 2022 at Sichirai sub location in Kakamega Central Sub-county within Kakamega County, Murdered one GRIFFIN SHANGUYA CHIMASIA.”

25. On 29<sup>th</sup> September 2022, the two Accused persons, who Mr. Shivega represented, took a plea. The charge was read out to them in Kiswahili, the language they both preferred, and they each pleaded not guilty.

26. The matter proceeded to hearing with the Prosecution calling a total of six (6) witnesses, and the Accused's Counsel, Mr. Shivega, was allocated ample time to cross-examine each witness after which the Prosecution closed its case.

27. After this court found that the Prosecution had established a prima facie case, the Accused persons filed the present application.

28. Section 134 of the Criminal Procedure Code requires, in mandatory terms, that every charge should be precise and abundantly clear to the Accused. It provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

29. In the case of Isaac Omambia vs. R, [1995] eKLR, the Court held that:-

“The particulars of a charge form an integral part of the charge.”

30. In Cherere s/o Gakuli vs. R [1955] EACA 622, it was held that:-

“The test remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity”.



31. In *Edy v Republic* [2025] KEHC 15279 (KLR), Justice Ongeru stated that:-
- “A charge sheet is the foundation of a criminal case, and any defect in it may be fatal to the prosecution’s case if it prejudices the accused or renders the trial a nullity. However, not every irregularity vitiates a trial.”
32. Section 134 of the Criminal Procedure Code does not demand an exhaustive recital of the evidence or every detail of how the offence occurred. The guiding principle is whether the information enables the accused to know the nature of the charge to enable him prepare his defence.
33. In *Ngombo v Republic* [2023] KEHC 22994 (KLR), the High Court at Kerugoya held that defects which are not substantive, and which do not mislead or prejudice the accused, are not fatal and can be cured under Section 382 of the Criminal Procedure Code.
34. I now turn to the case at hand. Upon perusal of the court’s record, it is patently clear that the Charge Sheet discloses the date of the alleged offence being 14<sup>th</sup> September 2022, the name of the deceased (GRIFFIN SHANGUYA), and the place where the offence was allegedly committed (Sichirai Sub-Location in Kakamega Central).
35. The Accused persons claim that the disclosure of the time, the means and manner in which the offence was committed, not being addressed in the information, would occasion them great prejudice and they would not be able to defend their case. This court, however, notes that the Accused persons were represented by Counsel, Mr. Shivega, from when the whole trial process began, that is, when they pleaded to the charge, during the cross-examination of the prosecution witnesses, and participated fully in the trial, which gave an account of how the deceased was assaulted and the means used. At no point did the Accused persons express confusion as to the nature of the charge being levelled against them. These facts demonstrate that they were well aware of the case they had to meet.
36. In *Paul Katana Njuguna v Republic* [2016] KECA 207 (KLR), the Court of Appeal in Nairobi held that:-
- “In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him, and when the witnesses testified, he fully cross-examined them. He raised no complaint before either the trial court or the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted, the rule against duplicity is designed to enable an accused to know what the case must prove. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the accused’s mind regarding the charge framed and the evidence presented, a charge that may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court, and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant’s belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect, if any, was in any event, curable under Section 382 of the Criminal Procedure Code.”
37. Be that as it may, the court holds the view that many times, it may not be possible to know to exactitude when and how a deceased person met their death. But even so, the committal bundle, which



is furnished upon the Accused immediately upon the taking of the plea, ensures that the Accused is apprised with the nature of the evidence against him which may or may not include the time and manner of death.

38. The claim that the information omitted the manner or means by which the offence was committed mixes up what constitutes a charge with what amounts to evidential details. The specifics of how the death occurred are matters to be demonstrated through evidence at trial, rather than particulars that must be expressly set out in the information.
39. Furthermore, the application was filed after the close of the prosecution's case, when the court had already ruled that the Accused persons had a case to answer. Sections 137 and 214 of the Criminal Procedure Code empower the prosecution to amend the information before the close of its case. After that stage, the court can only interfere if the defect is so grave that it occasions injustice; however, no such prejudice has been demonstrated in this case.
40. Even assuming there were irregularities as implied by the Accused persons, Section 382 of the Criminal Procedure Code provides that no finding or sentence shall be set aside by reason of an error or omission in the charge unless such error has occasioned a failure of justice.
41. In my considered view, the alleged defects are not there at all. The information contains sufficient details to enable the Accused persons to decipher the charges facing them and to prepare their defence. The Accused persons have not demonstrated any prejudice suffered as a result of the framing of the charge, nor have they shown that they were unable to conduct their defence effectively.
42. Consequently, I find that the information dated 26<sup>th</sup> September 2022 complies with the requirements of Section 134 of the Criminal Procedure Code and Article 50(2)(b) of *the Constitution*. The application dated 17<sup>th</sup> June 2025 is therefore without merit and is dismissed.
43. The matter shall proceed to the next stage of trial, with the Accused persons being called upon to present their defence.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 1<sup>ST</sup> DAY OF DECEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Mr. Muriithi for the Accused

Court Assistant: Polycap

