

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL REVISION NO. E005 OF 2025

KENYA REVENUE AUTHORITY.....APPLICANT

VERSUS

ALI ABDI DAHIR.....RESPONDENT

AND

OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED
PARTY

**(Arising from an order and ruling, in Malaba SPMCCRC No. E165
of 2023, by Hon. AZ Ogange, Resident Magistrate, RM, of 3rd
March 2025)**

RULING

1. These revision proceedings were initiated by way of a Motion dated 17th March 2025, by the Kenya Revenue Authority, the applicant, which sought inquiry into the propriety of proceedings in Malaba SPMCCRC No. E165 of 2023, targeting an order made on 3rd March 2025, by the trial court, asking this court to review, revise or set aside the said order, or the making of any other or relief as the court shall deem appropriate.
2. The background to the matter is given on the face of the application, and in the supporting affidavit. A motor-lorry, registration mark and number KDB 081T, had been intercepted on 12th September 2023, on suspicion of transporting suspected Government of Kenya subsidized fertiliser. The driver and exporter of the consignment, Paul Thuo Kariuki and Monica Karanja, were charged in court in Malaba SPMCCRC No. E165 of 2023, with offences under the Penal Code, Cap 63, Laws of Kenya, and the East African Community Customs Management Act, 2004, EACCMA, of conveying suspected stolen goods and bringing restricted goods into a customs area for exportation.
3. The accused persons, in Malaba SPMCCRC No. E165 of 2023, were acquitted, on 31st October 2024, in a ruling, under section 210 of the Criminal Procedure Code, Cap 75, laws of Kenya. The respondent herein, Ali Abdi Dahir, brought proceedings at the trial court, in that

suit, seeking release of the fertiliser to him, vide an application, dated 18th July 2024. The said application was resolved in his favour, on the basis of the acquittal referred to above, hence there was no impediment to the release, for the former accused persons had opted not to take part in the proceedings. The trial court ordered unconditional release of the 197 bags of fertiliser seized from the motor-lorry, registration mark and number KDB 081T.

4. The applicant herein was aggrieved, hence the revision application. It argues that it is aggrieved because the interested party had appealed against that acquittal, in Busia HCCRA No. E047 of 2024, being Republic vs. Paul Thuo Kariuki and Monica Wanjiku Karanja, which is still pending. It further argues that during investigations the respondent was unknown, and his interest in the consignment had never been established. Proof of ownership of the consignment was not discharged. It is also argued that the trial court had failed to acknowledge existence of the appeal in Busia HCCRA No. E047 of 2024.
5. The respondent argues only 1 issue, whether the applicant has prosecutorial powers to initiate or prosecute criminal proceedings in Kenya, in the absence of written authority from the interested party.
6. Directions were taken, on 1st April 2025, for disposal of the revision, by way of written submissions. Article 157(6)(b) of the Constitution, is cited, which vests jurisdiction on the Office of the Director of Public Prosecutions, to conduct criminal prosecutions, with a window for other persons and entities to prosecute criminal matters only with the permission of the Director of Public Prosecutions, and *Director of Public Prosecutions vs. Okemo & 4 others* [2021] KESC 13(KLR) (MK Ibrahim, SCJ, MK Koome, CJ & P, SC Wanjala, N Ndungu & W Ouko, SCJJ) is cited on the interpretation of Article 157 of the Constitution. He alleges that his agents were prosecuted and acquitted, upon which the Director of Public Prosecutions chose not to appeal. He urges that his goods were perishable.
7. The applicant, in its written submissions, has identified 3 issues for determination, around whether it had *locus standi* to file the instant application; whether the unconditional release of the fertiliser was premature and improper, in view of the pending appeal; and whether the respondent had discharged the burden of proving ownership of the consignment.

8. On the first issue, it submits that it was a party to the application in Malaba SPMCCRC No. E165 of 2023, which culminated in the orders of 3rd March 2025, had named it as a respondent to that application, and that it was mandated by the Constitution of Kenya to collect taxes, by dint of Article 209, as applied in such legislation as Kenya Revenue Authority Act, Cap 469, Laws of Kenya, and the Public Finance Management Act, Cap 412A, Laws of Kenya. It is further submitted that revision could be sought by anyone, and that it was not limited to an accused person or the prosecution. It cites Articles 165(6)(7) of the Constitution, section 362 of the Criminal Procedure Code, *Dominic Gichovi Mugo vs. Republic* [2016] KEHC 870 (KLR) (Muchemi, J), *Kenya Revenue Authority vs. Josiah Thiong'o* [2022] KEHC 1370 (KLR)(Ochieng, J) and *Kenya Revenue Authority vs. Asoka & another* [2024] KEHC 3093 (KLR) to support its arguments.
9. On the second issue, it is submitted that a trial court cannot release an exhibit during the pendency of an appeal. It cites the pendency of Busia HCCRA No. E047 of 2024. It is argued that the evidence adduced before the trial court remains central to the appeal, and remain available for re-examination by the court, going by *Kiilu & another vs. Republic* [2005] 1 KLR 174 (Tunoi, Waki & Onyango Otieno, JJA) and *Okeno vs. Republic* [1972] EA 32 (Sir William Duffus P, Law & Lutta, JJA) . It is argued that the seized fertiliser remained a crucial exhibit, for the purposes of the appeal, and that it would be irregular to have it released during the pendency of the appeal, for that would deprive the appellate court of the opportunity to assess the evidence in totality. *Simon Okoth Odhiambo vs. Republic* [2005] eKLR (Lesiit & Makhandia, JJ) is cited in support.
10. It is argued that the trial court having been notified that an appeal had been filed, should have taken judicial notice of that fact. It is further argued that the release of the fertiliser was contrary to section 214(3)(a) of the EACCMA, which requires detention of an item liable to forfeiture until determination of the prosecution. It was argued that the prosecution had not been determined, to the extent that an appeal had been proffered, and *Republic vs. Danson Mgunya* [2016 KECA 59 (KECA) (Makhandia, Ouko & M'Inoti, JJA) is cited in support.
11. On the third issue, whether the respondent had discharged the burden of establishing ownership of the said consignment, it is

argued, on the basis of sections 215 and 223 of the EACCMA, that upon acquittal, the goods in question should have been returned either to the accused persons, from whom they were seized, or be condemned. It is argued that no evidence was adduced to establish ownership of the fertiliser by the respondent.

12. These are revision proceedings. The proceedings before me are pegged on Article 165(6)(7) of the Constitution and sections 326, 364 and 367 of the Criminal Procedure Code. Both sets of provisions vest the High Court with powers over subordinate courts. Whereas the constitutional provisions confer what it refers to as supervisory jurisdiction, the Criminal Procedure Code confers a revisional jurisdiction. The constitutional provisions are general, while the provisions in the Criminal Procedure Code are limited to criminal proceedings.
13. The two provisions, however, cover the same subject, conferment upon the High Court with jurisdiction to oversee how the subordinate court discharge their mandate. Under the Constitution, the power is to look at the record of the trial court, and to give directions on the way forward, with an eye on effective administration of justice.
14. The Criminal Procedure Code provisions focus on legality, propriety, correctness and regularity of proceedings and orders. The 2 provisions are clearly on matters of procedure, and not substance. Legality would largely turn on jurisdiction, in terms of whether the matter is before the proper court, whether the court before which the matter is placed has been vested with power to determine it, whether that court has the legal competence to handle it, whether it is a matter that ought to be placed before it. Jurisdiction is a substantive matter, but touching on process, who has power to do what. Propriety and correctness are related. Again, it is about jurisdiction and procedure, whether an order was proper and correct, not in terms of substance, but in view of the procedural arrangements. Regularity is also about process, whether the processes, indulged in to reach the outcome, followed the laid down procedure.
15. The revisional jurisdiction in the criminal process is akin to the review procedure under the Civil Procedure Act, Cap 21, Laws of Kenya, and the Civil Procedure Rules, which also goes to process,

focusing on errors on the record, discovery of new evidence after the completion of proceedings, and related matters.

16. Supervisory jurisdiction, which is also exercised under Judicial Review, and revisional jurisdiction are distinguished from appeals, which turn largely on the substance of the impugned decision. Procedure can be subsumed in appeal, and an appeal can be on both substance and procedure. However, supervisory jurisdiction and revisional jurisdiction are limited to procedure. It is for that reason that, under section 362(5) of the Criminal Procedure Code, where an “... *appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*”
17. What I have discussed above is the background within which supervision of a trial court, and revision of its orders, may be sought.
18. The principal issue herein appears to turn around whether the applicant herein has capacity to bring the application herein for appeal. The criminal prosecution, in Malaba SPMCCRC No. E165 of 2023, was conducted by the interested party, at the instance of the applicant as the complainant. That meant that the applicant was not a principal party in those proceedings. The principal parties were the 2 accused persons and the Republic, represented by the interested party. The complaint that gave rise to the criminal proceedings arose from the applicant, but the prosecution was conducted by the interested party, who is mandated under the Constitution to do so, unless he authorises another to prosecute. In that case, no other person or entity was authorised to conduct the prosecution, the interested party chose to mount it itself.
19. It should then follow that, in the event the applicant was aggrieved by any of the orders made in the course of those proceedings, the best cause of action would be to leave it to the interested party to challenge the orders, either on appeal or revision. It would be untidy, that out of the same proceedings, we have the interested party initiating certain processes, while the applicant is also filing others. It would be imprudent to have prosecutorial powers shared out between the Office of the Director of Public Prosecutions and the complainant in the same matter. The advisable thing should be for the Office of the Director of Public Prosecutions to conduct all proceedings arising from the same matter, or, in the

alternative, allow the applicant to take over everything. It could be that the applicant doubts the ability of the interested party to handle certain aspects of the matter, however, that should not be justification for it to file process, which the interested party is already seized of.

20. The applicant also grounds its revision application on Article 165(6)(7) of the Constitution, and thereby invoking the supervisory jurisdiction of the High Court. Although both the retired Constitution and the current Constitution vest the High Court with supervisory jurisdiction, no rules of procedure have ever been developed, on when and how that jurisdiction is to be invoked. It remains unclear on whether the current procedure on review and revision cover the subject, or whether the supervisory jurisdiction is to be treated as separate from the review and revision envisaged in the Civil Procedure Act and the Civil Procedure Rules. The parameters, within which the supervisory powers, under Article 165(6)(7) of the Constitution, are to be exercised, have not been expounded in a dedicated legislation, specific to the said constitutional provision, and the court has only what the Constitution itself provides to work with.

21. Working only with the Constitution, Article 165(6)(7), the sense I get is that that provision gives the High Court a fairly wide discretion. It can exercise supervisory jurisdiction in both civil and criminal matters. In the absence of express provisions on the process of placing the matters before the court, it would appear that the court can act on any matter brought to it in any manner, whether by formal application, or informally through a letter, or by merely being placed before it by the Deputy Registrar of the court for guidance. It would appear that any person, whether a party or not, may bring the matter to the attention of the court, so long as there is an issue which touches on administration of justice. From the perspective of the Constitution, it would appear that the applicant had locus to come before the court, as the court which supervises the magistrate's court, to invite it to call for the records of the trial court, for supervision purposes. It would only be on that basis that I would examine the impugned order.

22. The next consideration should be whether the impugned order is available for revision in the manner suggested by the applicant. The issue is with what should happen to goods that had been impounded, and which gave rise to the prosecution. Focus should be

on what the relevant provisions prescribe should be done with such items, at the termination of the criminal proceedings. At the termination of the proceedings, the trial court should make orders on the disposal of the goods. Where the proceedings terminate in favour of the accused, the usual thing should be to have the goods released to the accused person, or whoever is established to be the owner thereof, unless they are prohibited or contraband goods, in which case they would be forfeited and destroyed. Where the proceedings lead to a conviction, the usual thing would be an order for forfeiture of the goods to the State, or the destruction of the goods.

23. I have perused the record of the trial court, inclusive of the ruling of 31st October 2024, which terminated the criminal proceedings. The 2 accused persons, in those proceedings, Paul Thuo Kariuki and Monica Wanja Karanja, had been charged with conveying suspected stolen goods. The trial court established that the source of the goods was known, hence the 1st accused could not possibly have stolen them, and secondly, he was just a driver, who had been instructed to transport them, to a certain destination, and he would not have known whether or not the said goods were stolen. The 2nd accused had been charged with conveying Government property. The trial court found that there was no connection between the 2 accused persons, to warrant charges being brought against her, with respect to the goods that the 1st accused was transporting.

24. The goods had been seized on the basis that they were stolen. A prosecution was mounted, to establish the theft. No proof of theft was presented. The accused were absolved of any wrongdoing, with respect to the said goods, and were acquitted. Having been acquitted, the said goods should have been released to the accused person from whom they were seized, or to whoever else that the trial court was persuaded was entitled to them, unless they were prohibited or contraband goods. There was no criminality established, with respect to them, which could justify their continued detention, neither has it been established that the said goods were illegal, prohibited or contraband.

25. The issue of an appeal having been proffered was raised, to justify continued detention of the goods, pending the appeal. The appeal was by the Director of Public Prosecutions, and not the applicant herein. The proper party, to seek continued detention of the goods pending appeal, should be the party in the appeal, in this

case the Director of Public Prosecutions. There would be something improper, with the applicant, filing process, in an appeal filed by the Director of Public Prosecutions, instead of letting the Director of Public Prosecutions discharge its constitutional mandate, without interference or direction from it.

26. I note that the applicant has relegated the Director of Public Prosecutions to the position of an interested party, in these proceedings. The Director of Public Prosecutions was the driver of the prosecution in Malaba SPMCCRC No. E165 of 2023, and has filed appeal in Busia HCCRA No. E047 of 2024, arising from those Malaba proceedings. The applicant is, no doubt, with respect to the proceedings at the trial court and in the appeal, intervening in a manner that reduces the Director of Public Prosecutions to a spectator, in proceedings in which he should be at the driver's seat.

27. Having carefully reflected on the proceedings that were conducted in Malaba SPMCCRC No. E165 of 2023, I am unable to find basis for the revision that the applicant seeks. I see no illegality, incorrectness, irregularity or impropriety in the order made on 3rd March 2025. Consequently, I hereby decline the revision sought, in the application, dated 17th March 2025.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA,
THIS 22ND DAY OF DECEMBER 2025.**

**W MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Maina, instructed by Sheila Sanga, Advocate for the applicant.

Mr. Omeri, instructed by Omeri & Company, Advocates for the respondent.

Mr. Onanda, instructed by the Director of Public Prosecutions, for the interested party.