



REPUBLIC OF KENYA



KENYA LAW
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**Director of Public Prosecutions v Republic & another (Criminal Revision
E031 of 2025) [2026] KEHC 319 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL REVISION E031 OF 2025
M THANDE, J
JANUARY 23, 2026**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

REPUBLIC 1ST RESPONDENT

MAHFUDH AHMED BAKARI 2ND RESPONDENT

RULING

1. By an Application dated 2.4.25, the Applicant seeks the following orders:
 1. Spent.
 2. That this Honourable Court urgently call for the file being Malindi MCTR No. E296 of 2024, R-VS- Mhfudh Ahmed Bakari and examine the record of the proceedings therein as to the correctness, legality and or propriety of the Ruling and consequent order made by the said Court on the 6th day of March, 2025 in relation to barring the Applicant from supplying the Certificate of Photographic Evidence and hence relying on it in its evidence.
 3. That the proceedings before the Learned Criminal Magistrate in Malindi MCTR No. E296 of 2024, R-VS- Mhfudh Ahmed Bakari be stayed pending the hearing and determination of this application for revision.
 4. That the Honourable Court be pleased to invoke its powers and vary the orders of the lower court by setting them aside and order that the Prosecution does supply the Certificate of Photographic Evidence and proceed to be allowed to produce and rely on it in its evidence and the photographs thereto.
 5. Any other order that this court may deem fit and just to grant.



2. The Applicant states that the 2nd Respondent is charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act in Malindi MCTR No. E296 of 2024. On 5.12.24, the investigation officer attempted to produce the certificate of photographic evidence, which had not been supplied to the defence. The defence objected to the production of the certificate of photographic evidence this at this late stage of the trial contending that its production is tantamount to trial by ambush. The Applicant sought to stand down its witness and serve the certificate of photographic evidence as it sought to rely on it, and take another date for hearing. The Applicant pleaded that the certificate of photographic evidence had been inadvertently left out but that photos to which said certificate related, had been supplied. Relying on the Supreme Court case of Khalid & 16 others v Attorney General & 2 others (Petition 21 of 2017), the Applicant asserted that disclosure is a continuous process during trial, provided that the Accused has not been put to his defence.
3. In her ruling, the trial Magistrate upheld the objection by the defence and denied the prosecution's application to supply the document in question. She stated that it was too late in the day to attempt to produce a new document. It is this ruling that has provoked the Application before Court.
4. The 2nd Respondent opposed the Application vide a replying affidavit sworn on 28.7.25. He averred that when he took plea on 29.7.24, his advocate sought to be supplied with copies of the charge sheet, investigation diary and any other document that the prosecution would be relying on during the trial. The documents were supplied except the certificate of photographic evidence. He stated that by 5.12.24, when PW6 unsuccessfully attempted to produce photos allegedly taken in connection to the traffic case, a total of 5 prosecution witnesses had testified and concluded their testimonies. It is the 2nd Respondent's contention that the said certificate ought to have been supplied together with the other documents supplied prior to the commencement of my trial to enable him adequately prepare for trial in accordance with the provisions of Article 50 of the Constitution. He further contends that the attempt by the prosecution to stand PW6 down so that she can supply the certificate after the objection was a clear and obvious attempt to steal a match.
5. The 2nd Respondent further averred that as was noted by the trial court, the prosecution did not provide any explanation as to how it would proceed if allowed to introduce new evidence in light of the fact that 5 prosecution witnesses had already testified. Additionally, that the Khalid case is distinguished in that the trial in that case had not commenced. The 2nd Respondent urged that the Application be dismissed.
6. This Court has supervisory jurisdiction over subordinate courts. Article 165(6) and (7) of the Constitution thereof provide as follows:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
7. In exercise of its supervisory jurisdiction, this Court is empowered to call for the record of proceedings in such subordinate courts, and make and give appropriate orders and directions as it deems necessary to ensure the fair administration of justice.



8. Upon obtaining the record of criminal proceedings in subordinate courts, this Court is required to examine the same and satisfy itself as to the correctness, legality or propriety of any finding, sentence or order. Section 362 of the Criminal Procedure Code provides:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

9. Section 364 confers upon this Court the power of revision as follows:

1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - b. in the case of any other order other than an order of acquittal, alter or reverse the order.
 - c. ...

10. I have perused the record herein with a view to satisfying myself of the correctness legality or propriety of the order complained of.

11. Section 78 of the *Evidence Act* provides:

1. In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film or an electronic and digital medium submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.
2. The court may presume that the signature to any such certificate is genuine.
3. When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.

12. Under the above provision, the court may admit photographic evidence without calling the maker thereof, provided that a certificate of the officer who prepared the photographic print or photographic enlargement from exposed film or an electronic and digital medium is also produced.

13. In *Republic v John Ochieng' Ochieng'* [2021] KEHC 4905 (KLR) relied upon by the 2nd Respondent, Aburili, J. considered an application by the prosecution to produce two photographs as part of exhibits without the certificate of the Scenes of Crime personnel who processed or generated the photographs that were taken by the investigating officer using his personal digital phone. The learned Judge stated:

In the absence of the certificate or person who produced the photographs, the order which would have been appropriate, but which unfortunately was not sought by the prosecution, was to bond the authorized officer who generated the photographs to appear in court to testify and to afford the Defense an opportunity to cross-examine him or her. This was never sought. (emphasis)



14. In the cited case, the question before the court was whether the photographs marked for identification could be produced as evidence in the absence of the certificate as provided for in Section 78 of the Evidence Act. The circumstances herein are distinctly different as the Applicant sought to stand down its witness and serve the certificate of photographic evidence as it sought to rely on it, and take another date for hearing. The Applicant pleaded that the certificate of photographic evidence had been inadvertently left out but that photos to which said certificate related, had been supplied. The cited authority is thus unhelpful.
15. The record shows that counsel for the 2nd Respondent confirmed to the trial court receipt of the charge sheet and statements and post mortem report. He stated that he would obtain the rest of the documents from the investigation officer. It is not disputed that the photographs were supplied to the 2nd Respondent. Indeed, the same were referred to in the testimony of the PW1 and the 2nd Respondent had opportunity and did indeed cross examined PW1 on the same. The photographs were marked for identification. What was not supplied was the certificate of photographic evidence was not supplied to the 2nd Respondent when all other documents to be relied on by the Applicant were supplied.
16. When PW6 attempted to produce the photographs marked for identification, the 2nd Respondent however objected to the same, citing noncompliance with Section 78 of the Evidence Act which requires that photographs be accompanied by a certificate of photographic evidence. At this point, the Applicant sought to stand down its witness and serve the certificate of photographic evidence as it sought to rely on it, and take another date for hearing. The trial Magistrate agreed with the 2nd Respondent and declined the Applicant's application.
17. The question for determination for this Court is whether the trial court was right in declining the Applicant's to supply the certificate of photographic evidence. The Constitution under Article 50(2) guarantees to every accused person, the right to a fair trial. Relevant to the matter herein, Article 50(2) (j) provides as follows:
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
18. The constitutional duty of the prosecution to provide the witness statements to an accused person and the duty of the trial court to ensure compliance cannot be gainsaid. However, However, an accused person has an obligation to bring to the attention of the trial court that he has not been supplied with all documents as ordered by the court.
19. In *Khalid & 16 others v Attorney General & 2 others* (Petition 21 of 2017) [2019] KESC 93 (KLR) (18 October 2019) (Judgment), the Supreme Court had this to say on the issue:
 90. Indeed, it is salutary practice for the trial court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial.
20. The Court went on to state:



91. Further, our jurisprudence is replete with authorities to the effect that presentation of evidence is a continuous process during the trial process provided that the accused has not been put to his defence.
21. Duly guided, and noting that the 2nd Respondent was yet to be put on his defence, the trial Magistrate ought to have allowed the application by the Applicant, to stand down PW6 in order to supply the 2nd Respondent with the certificate in question. I am further fortified in my finding by the fact that the 2nd Respondent cross examined on the photographs which had been marked for identification and will still have an opportunity to cross examine PW6 upon production of the same. I see no prejudice that will be occasioned to the 2nd Respondent if the Application herein is allowed.
22. In the end I find that the application is merited and the same is allowed on the following terms:
1. The orders of the trial court of 6.3.24 are hereby set aside.
 2. The Applicant is allowed to supply to the 2nd Respondent with the certificate of photographic evidence by 30.1.26 and is further allowed produce and rely on the same together with the photographs in relation thereto in Malindi MCTR No. E296 of 2024, R-v Mahfudh Ahmed Bakari.

DATED SIGNED AND DELIVERED IN MALINDI THIS 23RD DAY OF JANUARY 2026

M. THANDE

JUDGE

