



Chief Registrar of Judiciary v Mutua & another (Criminal Revision E116 of 2025) [2026] KEHC 5602 (KLR) (22 April 2026) (Ruling)

Neutral citation: [2026] KEHC 5602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E116 OF 2025
JN ONYIEGO, J
APRIL 22, 2026**

BETWEEN

CHIEF REGISTRAR OF JUDICIARY APPLICANT

AND

BRITON YUMBIA MUTUA 1ST RESPONDENT

JOSHUA MULUNJE MUSEMBI 2ND RESPONDENT

*(Revision from the Directions of Hon. Y.A Shikanda
(SPM) Makindu delivered on 7th August 2025)*

RULING

1. Before me is a letter dated 7/8/25 authored by Hon. J.A. Shikanda SPM Makindu Law Courts seeking exercise of this court's revisionary powers in respect of the alleged procedural impropriety and or irregularities in respect to the manner in which proceedings in Makindu Cr. C. No. E321/2021 were conducted.
2. Briefly, Briton Yumbia Mutua hereinafter referred to as the 1st Accused and Joshua Mulunje Musembi hereinafter referred to as the 2nd Accused, were jointly charged before the Makindu SPM's Court with the offence of stealing two goats contrary to Section 278 of the Penal Code. Particulars are that, on the 30/4/2021, at Straw Bag area of Kambu in Kibwezi Sub-County within Makueni County they stole two goats valued at Kshs.12,000/= the property of Phylis Musyawa.
3. In the alternative, accused 2 was charged with handling or conveying suspected stolen property Contrary to Section 323 of the Penal Code. Particulars are that, on the 30/4/2021, at Straw Bag Kambu in Kibwezi Sub-County within Makueni County having been detained by No. 224563 Cpl. Bilal Loyo and No. 117154 P.C (W) Rachael Wangui as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code had in his possession two goats reasonably suspected to have been stolen or unlawfully obtained.



4. The accused were arraigned before the court on 3/5/21 for plea. They denied the charges and consequently, a plea of not guilty was entered. Before hearing could commence, the 1st accused changed his plea to that of guilty. He was accordingly convicted on 9/6/21 before Hon. J.O Magori. He was subsequently sentenced to 4 years' imprisonment.
5. The matter was then to proceed for hearing against accused 2. Unfortunately, accused 2 jumped bail and Warrant of Arrest was issued. He later resurfaced and upon explaining satisfactorily reasons for his absence, Warrant of Arrest was lifted but he was to deposit afresh cash bail in default to remain in custody.
6. On 8/12/2021, accused 2 again went missing and Warrant of Arrest was issued. On 12/1/2022 the court prosecutor withdrew the case under Section 87 (a) of the Criminal Procedure Code before Hon. B.Ireri technically having the court file closed. On 20/1/22, with the accused who appears from the record to have been in custody, Hon. Ireri ordered for the prosecution to avail another charge sheet for the accused 2 to plead.
7. It is however not clear from the record whether the 2nd accused was charged afresh or not. No fresh charge sheet is reflected on the record. Nevertheless, the matter seemed to have proceeded to further hearing on 14/6/23 before Hon. B. Ireri who took the evidence of PW1 and PW2. Before hearing commenced, accused 2 was once again released on cash bail of 10,000/= on 26/5/26.
8. On 13/8/2024, Hon. B. Ireri indicated that he was on transfer and therefore could not proceed with the hearing. The matter was then placed before Hon. Y.A Shikanda (SPM) on 4/12/2024. On that day, accused 2 was absent. Warrant of Arrest was then issued. However, it was reinstated on 5/2/25 after accused 2 complained that he was in custody when Warrant of Arrest was issued. Directions were then taken under Section 200 of the Criminal Procedure Code for Mr Y.A. Shikanda to take over the part heard matter. Unfortunately, due to persistent failure by the prosecution to avail witnesses, the prosecution was forced to close their case prematurely on 22/5/25. A ruling for a case to answer was then fixed for 17/7/25.
9. Before the ruling could be delivered, Hon. Shikanda realized that he and his brother Hon. B. Ireri had proceeded on hearing the case without afresh charge being preferred nor did the accused 2 take plea afresh as earlier on directed by B. Ireri. Hon. Shikanda was of the view that the entire trial after the withdrawal of the charge under Section 87 (a) of the Criminal Procedure Code was a mistrial hence referred the file to this court for revision and or directions.
10. I have considered the sentiments expressed by Hon. Shikanda. The only issue for determination is whether the trial of the 2nd accused after withdrawing the charges under Section 87 (a) of the Criminal Procedure Code was proper.
11. This court's authority has been called upon under Article 165 (6) and 7 of *the Constitution* and Section 362 and 364 of the Criminal Procedure Code.
12. Article 165 (6) does provide as follows:

“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.”



Equally Article 165 (7) does provide:

“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.”

13. Section 362 of the Criminal Procedure Code also provide as follows:

“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.”

14. Section 364 provides:

“(1) in the case of a proceedings 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. in proceedings under section 203 or 296 (2) of the Penal Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the Prevention of Organized Crimes Act, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



(5) When an appeal lies from a finding, sentence or order, an no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

15. From the record, it is apparent that after the 1st accused pleaded guilty and got convicted and thereafter the 2nd accused jumped bail and the case withdrawn under Section 87 (a) of the Criminal Procedure Code, the file was technically closed. Therefore, after the 2nd accused was arrested later, he ought to have been charged afresh under a different file, taken plea afresh and then proceed with the hearing.
16. In the obtaining scenario, the trial of the 2nd accused after terminating his proceedings under Section 87 (a) of the Criminal Procedure Code without pleading afresh to the charges rendered the subsequent proceedings a nullity hence a mistrial.
17. I do agree with Hon. Shikanda that we cannot breathe life to the irregular proceedings. The only option available to me is to declare the trial of the 2nd accused a nullity and therefore a mistrial. The criminal trial of the proceedings commenced after the termination of the charge against the 2nd accused under Section 87 (a) of the Criminal Procedure Code was irregular and therefore terminated.
18. Accordingly, accused 2 to be charged afresh and thereafter take plea in respect of a fresh charge before any competent magistrate in Makindu Law Courts. Criminal Case No. E321/2021 is effectively terminated and closed. The file be returned to Makindu Law Courts for safe custody.
19. Orders accordingly.

DATED, SIGNED, DELIVERED VIRTUALLY THIS 22ND DAY OF APRIL 2026

J.N. ONYIEGO

JUDGE

