



**Oyimba v Republic (Criminal Appeal E041 of 2023)
[2025] KEHC 899 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E041 OF 2023
SC CHIRCHIR, J
JANUARY 30, 2025**

BETWEEN

SHELTON WAKULO OYIMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Ruling of the Hon. C. Cheruiyot (RM) delivered on 3rd August 2023 in Kakamega chief Magistrate's court Criminal case No. E094 of 2022)

JUDGMENT

1. The appellant herein has been charged with the 10 counts of inter alia personation, making false documents, uttering false documents and obtaining money by false pretences. He filed a Notice of preliminary objection to the charges on several grounds. The trial court in its ruling dated 3rd August 2023, dismissed the preliminary objection.

Memorandum of Appeal

2. The Appellant being dissatisfied with the said ruling filed the present Appeal and has raised the following grounds:
 - a. That the trial magistrate erred in her ruling by ignoring all the facts and issues he raised in the preliminary objection.
 - b. The honourable magistrate closed her eyes on the issue of mediation/ alternative dispute resolution that he raised in his application
 - c. That the magistrate ignored the doctrine of sub judice in her ruling



- d. That the magistrate disregarded the ground of a fatally defective charge sheet in her ruling.
 - e. That the magistrate ignored the duplicity of charges and counts on the charge sheet in her ruling.
 - f. That the magistrate did not even address the issue of slander and wrong accusation by the respondent.
 - g. That the trial magistrate ignored the issue raised about money taken during arrest by the investigating officer one Ali athman no. 69622 the subject matter of the application and appeal.
 - h. The magistrate did not mention or give directions on the money extorted by the investigating officer Ali Athaman from the applicant on the day of arrest.
 - i. The learned magistrate did not foresee that the defective charge sheet is an abuse of the court process and out to victimize the appellant if allowed.
 - j. The learned magistrate overlooked the non-cognizable offence issue, the duplicated sections 382 and 313 of the penal code in the charge sheet and in her ruling
 - k. The learned magistrate totally ignored the application's annexure SWO1 to SWO 5 in her ruling
 - l. In her ring the learned magistrate totally ignored to address Article 29,49,50,51,157 and 159 of the constitution
 - m. That despite him raising the issue of charge sheet not signed and stamped by the OCS or police officer of a similar rank, the learned magistrate erred in law by going ahead with her ruling.
 - n. The honourable magistrate ignored the articles he raised in the constitutional rights in the application.
 - o. That the trial magistrate in her ruling never gave room for his application.
 - p. The magistrate failed to consider any of the issues he had raised.
 - q. The learned magistrate failed to analyse and interpret the evidence and facts before her on record and as such arrived at a ruling that is not justifiable.
3. The Appeal was canvassed by way of written submissions

Appellant's submissions

4. It is the appellant's first submission that the prosecution failed to call one Shelton Wekulo as a witness yet the whole case was about him and not David Maliki Juma. He also questions why the court did not amend the charge sheet to charge the correct person.
5. He further submits that the prosecution did not call safaricom officials to confirm the authenticity of the Mpesa statement, the till number and other transactions: that the court cannot rely on the said documents since they were not authenticated.
6. He further submits that the prosecution failed to call an officer from the national bureau of registration to confirm if the accused was Shelton Wekulo or David Maliki Juma.
7. He submits that his rights under Article 50 (a) had been violated since the trial court delayed in giving a ruling of the preliminary objection; that he has not been supplied with the ruling on no case to answer ;



that he has not been given a chance to prepare his defence, and he has been denied his legal right to have a legal representation .

8. He further submits that contrary to Article 50 (k) of the constitution, he was not been availed all the evidence on record and will suffer grievous harm as a result.

Respondent's submissions

9. The respondent submits that the preliminary objection was struck out because it was based on facts and not on law. The respondent has relied on the principles set out in Mukhisa Biscuit manufacturing Company Limited vs. West end distributors Limited (1996) EA in this regard.
10. On whether the court should have allowed Alternative dispute resolution mechanism, the respondent submits that the Advocate's Act make no provision for alternative disputes resolution mechanism for one masquerading as an Advocate. In this regard , reliance has been placed on the case of and the case of Murang'a Tea & coffee company ltd vs. Shikara Ltd and Another (2015) eKLR. on the issue of sub judice, the respondent argues that the other case referred to is yet to be completed.
11. On allegation of a defective charge sheet , it is submitted that the charge sheet met all the ingredients of a charge sheet as required by section 134 of the criminal procedure code. On the duplicity of charges , it is submitted that there is no evidence of the Appellant having been charged with the same offence with different transactions on the same count. On the alleged slander , the respondent points out that this is a criminal case and not a civil case.
12. On whether the Appellant's rights were breached , the respondent states that the trial court had no jurisdiction to adjudicate on the violation of rights.

Analysis and determination

13. This is a first Appeal and the role of this court is well settled. It is to review the evidence , evaluate it and arrive at its own findings without ignoring the conclusions arrived at by the trial court. (Ref: Selle & Ano vs Associated Motor Boat Co Ltd (1968) EA 123)
14. I have considered the trial court record, the memorandum of Appeal and the rival submissions of the parties. I have identified the following issues for determination:
 - a). whether this court should entertain this Appeal
 - b). Whether the Appellant's objection met the threshold of a preliminary objection
 - c). If in the affirmative, whether the preliminary objection has merit.

Whether this court should entertain this Appeal

15. This is an interim Appeal. The Appellant is appealing against the dismissal of his preliminary objection during criminal trial. There are certain principles that govern interim Appeals in criminal proceedings. In Republic vs. Mark Lloyd Steveson [2016] eKLR Justice Joel Ngugi held that:

“It is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors



correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below.” Hence the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals will not be exercised piece meal.....”

16. Further in *Thomas Patrick Gilbert Cholmondeley vs. Republic*[2008] eKLR, the court while addressing itself on interim appeal in criminal cases held as follows:

“.....In ordinary criminal trials, there is generally no interlocutory appeals allowed, for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; MugaApondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal..... We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the *constitution*. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court.”

17. I have observed that despite the Appellant listing several grounds of Appeal he has only argued only three, namely the identity of the person being charged, , failure to summon witnesses and failure to be supplied with the ruling, the subject matter of this Appeal. I will therefore confine my determination to the three issues.
18. I have perused the present file and found that a copy of the ruling dated 3rd August is available on record. The Appellant complaint has therefore been overtaken by events.
19. On the question of the names used, I have perused the record of proceedings so far made and taken note of the fact that the Appellant has been identified as David Maliki Juma alias Shelton Wekulo Oyimba. If there is any fault in the usage of names interchangeably during trial , it will cause no prejudice to the Appellant and can always be taken as a ground of Appeal once the lower court trial is completed.
20. Finally on the question of witnesses not summoned , the trial is still on , and this issue is therefore pre-emptive .Indeed the prosecution is yet to close its case. Further and in any event , the Appellant can make an Application to summon the said witnesses. Again, this is a matter that would not prejudice his trial as the issue can be taken up as a ground of Appeal upon conclusion of trial.
21. Thus looking at the grounds that the Appellant has presented for consideration, and duly guided by the above decisions referred to herein, am not satisfied that this court should entertain an interim



Appeal. There is no valid reason as to why the trial should be slowed down. There are no exceptional circumstances in this case that warrants an interim Appeal. All the three issues raised can be taken up on Appeal , upon the conclusion of trial.

22. Consequently, this Appeal is hereby struck off. The Trial court should proceed with the trial in Kakamega chief magistrate's court criminal case No. E 094 of 2022.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

