



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Office of the Director of Public Prosecutions v Korja (Criminal Revision E011 of 2024)
[2025] KEHC 4869 (KLR) (Anti-Corruption and Economic Crimes) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL REVISION E011 OF 2024**

BM MUSYOKI, J

APRIL 25, 2025

BETWEEN

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

PETER GITAA KORJA RESPONDENT

(Being an application for revision of ruling of the Chief Magistrate (Hon Celesa Okore PM) at Milimani Anti-Corruption Court in its case number E013 of 2024 dated 30th September 2024)

RULING

1. This is a criminal revision application seeking the following orders;
 - i. Spent.
 - ii. Spent.
 - iii. This Honourable Court be pleased to call for and examine the record of the proceedings in Nairobi Milimani Anti-Corruption case No. E013 of 2024 Republic vs Peter Gitaa Korja for the purpose of satisfying itself on the correctness, legality or propriety of the ruling delivered by Hon. Celesa Okore PM on the 30th September 2024.
 - iv. The Court be pleased to review, vary, reverse and/or alter the orders issued on 30th September 2023 by the Hon. trial Magistrate in Nairobi Milimani Anti-Corruption case No. E013 of 2024 Republic vs Peter Gitaa Korja dismissing the applicant's application dated 11th September 2024, and this Honourable Court be pleased to order that;
 - a. The applicant is granted leave to supply the additional documents and witness as proposed in the notice of motion application dated 11th September 2024.



- b. The applicant is granted leave to amend the charge sheet as proposed in the notice of motion dated 11th September 2024.
2. The applicant has deponed in supporting affidavit sworn by Annette Wangia on 2nd October 2024 that it had during pretrial of the matter in the lower court prepared and supplied documents to the respondents during pre-trial. The matter proceeded substantially where the applicant called 17 witnesses but the applicant discovered that there was need to supply additional evidence and hence filed a notice of motion dated 11th September 2024 seeking leave of the court to supply the identified additional documents. The application was disallowed by the trial court on 30th September 2024. The said notice of motion had the following prayers;
 - a. The honourable court be pleased to certify the application as urgent and heard inter-partes on a date as the court shall direct.
 - b. The honourable court be pleased to grant the prosecution leave to amend the charge sheet as per the draft charge sheet annexed in the supporting affidavit of Peter Khamala sworn on the 11th September 2024 and marked as 'PK-1'.
 - c. The honourable court be pleased to grant the prosecution leave to supply additional documents to the respondent as per the list of exhibits dated 10th September 2024 annexed in the supporting affidavit of Peter Khamala sworn on the 11th September 2024 and marked as PK-2.
3. According to the applicant, the need to amend the charge sheet was occasioned by re-evaluation of the pending evidence yet to be adduced that disclosed a variance between the charges and the evidence while the need to supply additional evidence and a further witness statement was necessitated by need to address the issue of admissibility of the already disclosed evidence in order to avoid objection as to the admissibility during the trial which would waste the court's time and ensure smooth prosecution of the case.
4. The respondent did not file papers in opposition to the application before the trial court but made oral submissions as can be seen in the trial court's impugned ruling. In this application, the respondent has filed what he calls constitutional questions in the following terms which I quote in verbatim;

'The amendment as sought, is not only prejudicial to the rights of the accused but also contravenes established spirit and principles of *the Constitution* as follows;

 - a. Justice is our shield and defender.
 - b. Justice delayed is justice denied.
 - c. Article 50(2) (e) no reasonable delay.
 - d. Article 50(2) which provides for fair trial to have sufficient time to understand and respond to charges against me.
 - e. Article 159(2)(a) justice should not be delayed.
 - i. Article 159(2)(e) the court should promote the principles and purpose of *the constitution*.
 - f. It is the duty of the court to enforce constitutional provisions. Article 19(1) makes the bill of rights an integral part of our social economic framework.



- g. Article 20(1) binds all law and all organs.
 - h. Article 21(1) obligates every person and state organ to observe, promote, protect and fulfil the bill of rights.
 - i. Article 2(4) of *the Constitution* declares that anything done in contravention of *the Constitution* is invalid.
 - j. We submit that the trial appreciate and applied correctly the principles and values of *the Constitution* therefore she cannot be faulted.
 - k. Article 50(2)(b)(c) of *the constitution* of Kenya.’
5. I have quoted the above in exact words as drawn by the respondent due to the obvious errors and although the larger part of it appears incomprehensible, I understand and take it to be a combination of grounds of opposition and submissions. The applicant filed submissions dated 19th November 2024 which I have carefully read together with the cited authorities.
6. I have also gone through the impugned ruling and note that the Honourable Magistrate disallowed the application for several reasons one of them being that the prosecution had been given enough and sufficient time to examine witnesses and documents before disclosures and since the prosecution had already called 18 witnesses, the defence would be prejudiced and disadvantaged by the prosecution’s move and thus the motion was trial by ambush. The court also observed that the prosecution was intending to reopen the pre-trial process and hence disrupt the trial and therefore the application was meant to derail the case. It was the court’s further opinion that the prosecution was abusing its discretion donated under Article 157 of *the Constitution* hence abusing the rights of the respondent to fair and expeditious trial and allowing the application would give the prosecution the latitude to ignore structured pre-trial directions.
7. Article 50(2) of *the Constitution* provides for minimum requirement for a fair trial. The respondent has submitted that allowing the application would have infringed his rights under Articles 50(2)(c) and (e). These Articles require that an accused person be given adequate time and facilities to prepare defence and that the trial be conducted without unreasonable delay. The prosecution was not asking the court to have the documents supplied and the trial continue immediately neither was it asking for adjournment or delay of the trial. The remedy for having the application allowed could easily be found in giving the respondent time to go through the documents which had not been supplied before and have the matter proceed on another day. In cases where there is need to supply more documents or evidence in the middle of a trial, the court is obligated to give the accused person time to go through and examine the evidence prior to the same being adduced.
8. Pre-trial directions are meant to ensure that the right of the accused person and the duty of the prosecution are respected as well as expediting and having smooth proceedings but are not in themselves a closure to supply any additional evidence. The courts must strike a balance between the right of the accused persons and the duties and obligations of the prosecution noting that criminal cases are not just contests between the prosecution and the accused persons. There are other players in the criminal justice system such as the complainants, public and community whose interests must be protected. In applications of this nature, the court should exercise its discretion in a manner that ensures that the rights and duties of all the players in the proceedings are not compromised. On this



issue, I am guided by the Court of Appeal in Republic v Edward Kirui (2014) KECA 310 (KLR) where it stated as follows;

A fair trial will attempt to ascertain the truth. Miscarriage of justice was discussed in the Indian case of IN ZAHIRA HABIBULLAH SHEIKH & ANOTHER V STATE OF GUJARAT & OTHERS AIR 2006 SC 1367 wherein the Indian Supreme Court stated:

“It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted --- Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or a mere farce and pretence --- The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

We have no hesitation to state that the case of Republic V Edward Kirui occasioned great miscarriage of justice.’

9. I have gone through the list and bundle of the documents which the applicant sought to supply as new evidence which comprised of 21 documents. In comparison with the nature of this case and the number of the counts involved, I do not think that the said documents were so bulk as to amount to prejudice as the trial court seemed to suggest. The 21 documents seem to have been a supplement of what had already been supplied to the respondent. The respondent would have time and opportunity to cross examine whichever future witness was to introduce or produce the said documents.
10. The other set of documents which was said to comprise 145 documents were not new to the respondent. It is deponed that the same were to be re-supplied for purposes of complying with provisions of the Evidence Act in terms of production of electronic evidence. The respondent has not challenged this position and I take it to be correct. A certificate of electronic evidence cannot be new evidence since its purpose is to authenticate documents relevant to the certificate. In that case, there was no prejudice the respondent would have suffered in having the documents he was already in possession of authenticated before the trial proceeded.
11. In its ruling, the trial court made an observation that the respondent would be prejudiced because he had already structured his defence in a certain way. As rightly submitted by the applicant, there were other 18 witnesses remaining including the new witness who the respondent would have properly engaged in the proceedings. In these circumstances, I find the observation by the Magistrate that the respondent had structured his case in a certain manner interesting. The court was not acting for the respondent and was not and could not have been in a position to tell the strategy or the plan the respondent had employed in defending the case at that stage.
12. Having gone through the ruling and the record of the lower court, it appears to me that the respondent did not demonstrate how and what prejudice he would have suffered if the application was allowed. The prosecution’s application was not brought during or in the mid of any of the witnesses. The



documents were to be supplied for purposes of future testimony of the remaining witnesses and as submitted by the applicant, there was no intention to recall any of the witnesses who had already testified. In this regard, I do not see where the issue of derailing or delay of the trial as observed by the Magistrate arose.

13. Having stated the above, I do not see how the supply of the documents would have violated the respondent's rights under Article 50(2) of *the Constitution*. In this regard I hold that the findings of the Honourable Magistrate that declined to grant the prayer for supply of additional documents and witness statement to have been an error in law and I do hereby set it aside.
14. On the amendment of the charge sheet, the applicant intended to amend counts 3, 4, 5, 6 and 7 of the charge sheet by making them alternative counts to new counts. I have examined the said new set of the counts and the rearrangements of the existing counts to make them alternative and I have formed an opinion that they all flowed from the same set of events and facts. The law allows the prosecution to amend or substitute charges before the closure of its case. Upon amendment or substitution, the accused person should plead to the new charges and exercise their right to recall any of the prosecution's witnesses.
15. It is acceptable for the prosecution to amend the charges in order to align the same to the evidence adduced or to be adduced by its witnesses provided that the accused retains the right to test the veracity of the new charges in form of recalling witnesses or whichever other method available to them within the law his defence team may adopt.
16. In my view, the proposed new counts did not seek to bring a totally different offence which was not in alignment to the evidence so far produced. It is my finding therefore that the Honourable Magistrate erred in denying the applicant prayer 2 of its notice of motion dated 11-09-2024. The main point of consideration in deciding whether to allow amendment of the charge sheet is justice to the parties. In *Republic v Francis Kisienya Mumbi* (2016) KEHC 3509 (KLR) the court held that;

‘The test to be applied on whether or not to order an amendment is whether or not such an amendment would occasion an injustice.’
17. The upshot of the above is that this revision is allowed and the ruling of the Honourable Magistrate delivered on 30-09-2024 is hereby set aside and substituted therefor with an order allowing the prosecution's application dated 11-09-2024.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Evans Ondieki for the respondent and absence of the applicant.

