



Republic v Kirui & 2 others (Criminal Appeal E001, E004 & E005 of 2023 (Consolidated)) [2025] KEHC 7175 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E001, E004 & E005 OF 2023 (CONSOLIDATED)**

WM MUSYOKA, J

MAY 29, 2025

BETWEEN

REPUBLIC APPELLANT

AND

PHILEMON KIRUI RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL E004 OF 2023**

BETWEEN

REPUBLIC APPELLANT

AND

SAMUEL NYAGA RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL E005 OF 2023**

BETWEEN

REPUBLIC APPELLANT

AND

JOSEPHAT OJWEKE RESPONDENT

(Appeals arising from orders made in the ruling, in Busia CMCCRC No. E1217 of 2021, of 30th April 2021, by Hon. PA Olengo, Senior Principal Magistrate, SPM)



JUDGMENT

1. These three appeals are by the State, and they arise out of a ruling delivered in Busia CMCCRC No. E1217 of 2021, and purportedly subsequently delivered in three other cases, being Busia CMCCRC No. E1265 of 2021, Busia CMCCRC No. E1266 of 2021 and Busia CMCCRC No. E1271 of 2021. The appeals were not consolidated. They are only being disposed of simultaneously as it emerged, during the appellate proceedings, that they appeared to arise from the same ruling.
2. The respondents, Josephat Ojweke, Philemon Kirui, Samuel Nyaga and Paul Muriithi Kinyua, had been charged, in their separate cases, with counts of failing to register as dealers with the Agriculture and Food Authority, contrary to section 6(1), as read with section 16(4), of the *Crops Act*, Cap 318, Laws of Kenya; transporting a scheduled crop from a non-registered dealer, contrary to section 19(1)(b)(11) as read with section 19(3) of the *Crops Act*; importing a maize consignment through a non-designated point of entry, contrary to Regulation 12(3), as read with Regulation 12(12), of the Food Crops Regulation 2019; possession of uncustomed goods, contrary to section 200(d)(iii), as read with sections 210(c) and 213 of East African Community Custom Management Act, 2004; and conveying restricted goods, contrary to section 199(b), Part 1, as read with section 210(c), of the East African Community Management Act, 2004.
3. A trial was conducted, in Busia CMCCRC No. E1217 of 2021. Five witnesses testified, for the prosecution. In the end, Paul Muriithi Kinyua, the accused person, in Busia CMCCRC No. E1217 of 2021, was acquitted, on 30th April 2021, under section 210 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, as the Republic was said to have not established a prima facie case against him, to warrant his being put on his defence. That ruling, in Busia CMCCRC No. E1217 of 2021, delivered on 30th April 2021, was subsequently delivered in Busia CMCCRC No. E1265 of 2021, Busia CMCCRC No. E1266 of 2021 and Busia CMCCRC No. E1271 of 2021.
4. The Republic is the appellant in this appeal. It was aggrieved. All the three appeals were filed on 10th January 2023. The grounds of appeal, as listed in the petitions of appeal, which are replicas of each other, revolve around the trial court not appreciating that the direct evidence by PW1 was corroborated by PW1 and PW4, who saw the motor vehicles belonging to the respondents crossing over into Kenya from Uganda, and that he caused arrests of the respondents; not appreciating the evidence that the respondents were not registered dealers with the Agriculture and Food Authority; not appreciating that the evidence of PW4 corroborated the fact that the respondents crossed over from Uganda through Busia OSBP, as shown by the documents; not considering that the bags of maize in the possession of the respondents were intended for commercial purposes; failing to consider that the prosecution evidence was credible and sufficient to place the respondents on their defence; consolidating the hearings of the various matters yet the charges had not been consolidated; and applying the standard of proof for conviction on the preliminary issue of a case to answer.
5. Directions were taken, on 2nd November 2023, for disposal of the appeal, by way of written submissions.
6. The appellant has filed written submissions. The submissions are aligned to 3 grounds; that there was direct evidence by prosecution witnesses seeing the trucks in question entering Kenya, there was evidence that the respondents were not registered dealers with the Agriculture and Food Authority, and the court failed to appreciate the evidence of PW2 and PW5. *PON vs. Republic* [2019] eKLR (Ouko, Gatembu & Murgor, JJA), *Wilson Wanjala Mkendeshwo vs. Republic* [2002] eKLR (Omolo, Shah & Bosire, JJA), *Christopher Paul Ngau vs. Republic* [2019] eKLR (Ouko, Kiage & Odek,



JJA), China Zhongxing Construction Company Ltd vs. Anne Akumu Sophia [2020] eKLR, Donald Atemia Sipandi vs. Republic [2019] eKLR (Mativo, J) and Republic vs. Abdi Ibrahim Owl [2013] eKLR[2013] KEHC 2122 (KLR)(Mutuku, J).

7. I have not seen written submissions by the respondents. Mr. Okutta, appearing for them, had addressed me on 23rd April 2025, indicating that he would file his submissions. In the end, he did not.
8. There is one unique thing about this matter. There were several criminal matters relating to different individuals, driving different vehicles, charged with related offences. Paul Muriithi Kinyua was driving a motor vehicle registration mark and number KCY 224U, carrying maize, on 1st April 2021, and was charged in Busia CMCCRC No. E1217 of 2021. Samuel Nyaga was driving a motor vehicle registration mark and number KAM 952B, carrying maize, on 6th April 2021, and was charged in Busia CMCCRC No. E1266 of 2021. Josephat Ojweke was driving motor vehicle KCV 309R, on 6th April 2025, carrying bags of maize, and was charged in Busia CMCCRC No. E1265 of 2021. Philomen Kirui was driving motor vehicle KBU 019G, on 6th April 2021, carrying bags of maize, and was charged in Busia CMCCRC No. E1271 of 2021. Hariri Suezi was driving vehicle registration mark and number KDB 403N and was charged in CR. 1188/2021.
9. The appellant has filed appeals only against three of these individuals, Philemon Kirui in Busia HCCRA No. E001 of 2023, Samuel Nyaga in Busia HCCRA No. E004 of 2023; and Josephat Ojweke in Busia HCCRA No. E005 of 2023. There is no appeal against the acquittal of Paul Muriithi Kinyua. There is also no appeal against Hariri Suezi.
10. The original trial records for all three appellants, plus Paul Muriithi Kinyua, are before me. I have perused all of them. The proceedings were conducted in Busia CMCCRC No. E1217 of 2021, where the accused was Paul Muriithi Kinyua. This is where the handwritten trial notes are. This is where the testimonies of the six prosecution witnesses were recorded. It is also the place where the handwritten ruling was recorded and delivered on 30th April 2021.
11. No trial was conducted in Busia CMCCRC No. E1265 of 2021, where Josephat Ojweke was the accused person. The first entry, in that file, is of 16th April 2021, when that case was consolidated with three other cases, being CR. 69/21, CR. 72/21 and CR. 73/21. Then there are notes indicating that pleas were taken, and hearing was fixed for 19th April 2021. There is then a photocopy of the handwritten ruling recorded in Busia CMCCRC No. E1217 of 2021. It is recorded, in the file in Busia CMCCRC No. E1265 of 2021, that that ruling was delivered in that matter on 3rd May 2021.
12. Similarly, no trial proceedings were conducted in Busia CMCCRC No. E1266 of 2021, where Samuel Nyaga was the accused. There are only 2 entries in that file. The first is of 16th April 2021, which referenced orders that had been made in CR. 70/2021, with respect to a bond of Kshs. 50,000.00 and cash bail of Kshs. 10,000.00. The second entry relates to delivery of a ruling on 3rd May 2021. There is a photocopy of the handwritten ruling recorded in Busia CMCCRC No. E1217 of 2021, and it has an endorsement that it was delivered in this other file, Busia CMCCRC No. E1266 of 2021, on 3rd May 2021. There is then a typescript or a typed rendition of that handwritten ruling.
13. It is the same story in Busia CMCCRC No. E1271 of 2021, where the accused is Philomen Kirui. No trial was conducted. The first entry was recorded on 16th April 2021, and it applied the orders and proceedings in CR. 77/21 to that file, with respect to a bond of Kshs. 50,000.00, and cash bail of Kshs. 10,000.00. The other entry is on delivery of a ruling on 30th April 2021. The ruling, that was allegedly delivered on 30th April 2021, is that one handwritten and recorded in Busia CMCCRC No. E1217 of 2021. A photocopy of that ruling, the one handwritten in Busia CMCCRC No. E1217 of 2021,



is in the file in Busia CMCCRC No. E1271 of 2021, with an endorsement that it was delivered on 30th April 2021.

14. The picture that emerges is that all the five individuals, that I have mentioned in the foregoing paragraphs of this judgement, were prosecuted in one file, Busia CMCCRC No. E1217 of 2021, that is the file for Paul Muriithi Kinyua. Yet in that file there is no copy of a consolidated charge sheet for the five. I only see one charge sheet, which is limited to Paul Muriithi Kinyua alone. In Busia CMCCRC No. E1217 of 2021, I have not come across an order consolidating that case with Busia CMCCRCs Nos. E1265, E1266 and E1271 of 2021. I equally do not see any proceedings, where the accused persons in Busia CMCCRCs Nos. E1265, E1266 and E1271 of 2021 took plea, on a consolidated charge in Busia CMCCRC No. E1217 of 2021, to warrant their being tried in that matter. Indeed, there is nothing to show that the accused persons in Busia CMCCRCs Nos. E1265, E1266 and E1271 of 2021 were ever part of the trial process in Busia CMCCRC No. E1217 of 2021. There is nothing, in the record, in Busia CMCCRC No. E1217 of 2021, indicating that they ever attended court at any time during the trial in that case.
15. The only reference to consolidation, in Busia CMCCRC No. E1217 of 2021, was on 22nd April 2021, with respect to Hariri Suezi, when it was proposed that he, Hariri Suezi, could be “enjoined” to the case against Paul Muriithi Kinyua. An order was then made, the same day, for consolidation of CR. 1188/2021, which I believe related to that Hariri Suezi. The court file, in CR. 1188/2021, is not inside that in respect of Busia CMCCRC No. E1217 of 2021. I have not seen a consolidated charge sheet bringing Paul Muriithi Kinyua and Hariri Suezi in one case, and there is no record, in Busia CMCCRC No. E1217 of 2021, of the two individuals pleading to any consolidated charge. None of the appeals before me relate to Hariri Suezi, as stated here above.
16. The court file, in Busia CMCCRC No. E1265 of 2021, where the accused is Josephat Ojweke, has reference to consolidation of charges. That matter was purportedly consolidated with CR. 69/21, 72/21 and 73/21. After which four individuals purportedly took plea. The names of the four persons, who were pleading to those purported consolidated charges, are not disclosed or recorded in the file in Busia CMCCRC No. E1265 of 2021. It is not even clear to which charges they were purportedly pleading, as there is no copy of a consolidated charge in that file. It could be that Josephat Ojweke was one of them. But who were the rest? More crucially, after plea was taken from the four unknown accused persons, on the non-existent consolidated charge, no proceedings were conducted in that file, that could have led to delivery of a ruling on 3rd May 2021. Despite the consolidation order relating to CR. 69/21, CR. 72/21 and CR. 73/21, I have not come across the physical files relating to CR. 69/21, CR. 72/21 and CR. 73/21, inside the court file in Busia CMCCRC No. E1265 of 2021. There is nothing in that file, Busia CMCCRC No. E1265 of 2021, to connect that matter with the files in Busia CMCCRCs Nos. E1217, E1266 and E1271 of 2021.
17. My review of all these files leads me to conclude that there is no connection between the proceedings that were conducted in Busia CMCCRC No. E1217 of 2021, which culminated in the ruling delivered in there on 30th April 2021, to the files in Busia CMCCRC No. E1265, E1266 and E1271, to warrant the ruling in Busia CMCCRC No. E1217 of 2021, being applied to them. There is no order consolidating the four cases and there is no consolidated charge sheet for the four cases. One would even wonder why the ruling had to be delivered separately, in each of the four files, if there, indeed, had been a consolidated trial.
18. The ruling, that the Republic has appealed against, was delivered in Busia CMCCRC No. E1217 of 2021, relating to Paul Muriithi Kinyua. The appeals before me do not relate to Busia CMCCRC No. E1217 of 2021, where that impugned ruling was delivered. They relate to Busia CMCCRCs Nos. E1265, E1266 and E1271 of 2021, where no trials were ever conducted, and which were never



consolidated with Busia CMCCRC No. E1217 of 2021. That ruling, in Busia CMCCRC No. E1217 of 2021, according to the record before me, had nothing to do with those cases. Consequently, no appeal could legitimately arise from it, with respect to Busia CMCCRCs Nos. E1265, E1266 and E1271 of 2021.

19. My understanding of it is that the trial court mishandled the various cases that it was seized of, by failing, when the prosecution sought to consolidate the matters, to follow the correct and right procedure, relating to consolidation of criminal cases. I would also blame the prosecution. There should be an obligation, to regularly peruse court files, to confirm the orders recorded by trial courts, so as to take remedial measures early enough, to avoid fiascos, such as the instant one, where judicial time was wasted, and cases that could, perhaps, have been successfully prosecuted, were lost on account of serious technical flaws, that could have been rectified before the prosecution closed its case. Perusal of court records, by the prosecution, and indeed all the parties, is critical, to ensure that all the players in the process are in tandem, for honest mistakes are often made in the chaos of a trial.
20. The long and short of it is that the appeals before me are incompetent, misconceived and misinformed. I hereby dismiss them. This appeal file shall be closed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 29TH DAY OF MAY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the appellant.

Mr. Wycliffe Okutta, instructed by Ouma Okutta & Associates, Advocates for the respondents.

