Muriithi v Republic (Miscellaneous Criminal Application E057 of 2024) [2025] KEHC 9208 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9208 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISCELLANEOUS CRIMINAL APPLICATION E057 OF 2024

EM MURIITHI, J

JUNE 30, 2025

BETWEEN

JUSTO NYAGA MURIITHI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling on an application for revision dated seeking the following specific orders:

> " 1. That this Application be certified as urgent. fit to be heard ex-parte for granting of prayers 2 and 3 below. and service thereof be dispensed with at the first instance.
>
> 2. That pending the hearing and determination Honourable of this Application/ Suit, this Court be pleased to issue an order of stay of all proceedings in Kerugoya MCTR/217/2019-RepubJic v Justo Nyaga Muriithi currently being presided over by Hon. C Wanyama (PM).
>
> 3. That. pending the hearing and determination of this Application/Suit. this Honourable Court be pleased to call for and examine the Magistrates' Court record and proceedings in Kerugoya MCTR/217/2019-Republic v Justo Nyaga Muriithi to satisfy itself as to the regularity of the proceedings therein.
>
> 4. That this Honourable Court be pleased to issue an order of mistrial in respect of the charges and proceedings in Kerugoya MCTR/217/2019-RepubJic v Justo Nyaga Muriithi.
>
> 5. That this Honourable Court provides for the costs of this Application."

2. The applicant pleaded guilty to the five counts including the two for which he has been put through trial and found to have a case to answer. There is no indication on record as to when the accused changed his plea in the two counts to pave way for his trial.

3. The trial court then proceeded to convict the accused for the counts 3, 4 and 5 and directed trial for the counts 1 and 2 of the Charge.

4. In support of the application for revision, Counsel for the applicant urged for a mistrial as follows:

> " B. Whether the Applicant is entitled to the reliefs sought
>
> 38. The Applicant primarily prays for a declaration of a mistrial in respect of the charges and proceedings in Kerugoya MCTR/217/2019-Republic v Justo Nyaga Muriithi.
>
> 39. The Court of Appeal in Republic v Edward Kirui (cited above) affirmed the Black's Law Dictionary (9th Ed.) definition of a mistrial, to wit, a trial that the judge brings to an end. without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings."
>
> 40. The circumstances in which this Honourable Court may declare a mistrial were elaborated in R v Philip Ondara Onyancha [2017] eKLR as, ... where the procedural defect or error is likely to cause or has caused a gross miscarriage of justice to a victim, the accused or the prosecution ... A miscarriage of justice is the result of inter-a-liaan unfair trial... "
>
> 41. A declaration of mistrial, as explained in Sospeter Odeke Ojaamong & 8 Others v Director of Public Prosecutions & Another [2021] eKLR, renders the trial invalid owing to an error in the proceedings.
>
> 42. Accordingly, having elaborated and established five cogent grounds to demonstrate that this Application is merited, the Applicant submits that he is entitled to an order of mistrial on account of the various procedural defects underlying the proceedings in Kerugoya MCTR/217/2019-Republic v Justo Nyaga Muriithi.
>
> 43. The Applicant also prays for an order for costs in his favour. Notably, Section 171 of the *Criminal Procedure Code* limits this Honourable Court's power to order costs. A literal reading of this provision reveals that costs can only be ordered against accused persons and private prosecutors only.
>
> 44. However, the Applicant contends that the totality of the circumstances underlying this matter are such that warrant this Honourable Court's intervention and development of jurisprudence to the effect that even the State can be liable for costs where the rights of accused persons are violated and the scarce time and resources of this Honourable Court are abused and wasted through the (mis)conduct of state counsel.
>
> 45. For instance, in addition to the various, egregious violations of the law elaborated herein, the Applicant draws this Honourable Court's attention to the lacklustre manner in which the Respondent has conducted itself and even responded to this Application. The Applicant urges this Honourable Court not to countenance such behaviour, particularly considering the

constitutional imperatives embodied by Articles 10(2) and 232(1) of *the Constitution*. The Applicant submits that an award of costs to the Applicant would be a strong way to express this Honourable Court's displeasure with the jaded attitude exhibited by the Respondent in this matter and before the trial court.

Conclusion

46. The Applicant has advanced. elaborated. and established five cogent grounds in urging your Lordship on the merits of his Application. The record before the trial court are tainted by various procedural defects that. singly and cumulatively. strike at the validity of the entire proceedings and. therefore. warrant a declaration of a mistrial and an award of costs in the Applicant's favour."

5. For the DPP, the Submissions was non-committal giving the happenings at the trial court according to the record and suggesting there was no need for the ensuing trail for the counts 1 and 2 of the Charge, as follows:

"Prosecution's Submissions

The Applicant was arrested on 4th May 2019 and charged on five counts of traffic offence. Charges were read to him in a language he understood being {Kikuyu} and he pleaded guilty to all five Charges. He was convicted on own plea on Count 3,4and 5and in mitigation pleaded for forgiveness. On Count 3, he was fined Kshs.3000/- in default 1 Month in Prison. On Count 4, he was fined Kshs. 4000/- in default 1 Month in Prison. On Count 5, he was fined Kshs.4000/- in default 1 Month in Prison. The sentences were to run concurrently. On Count 1 and 2 the Prosecution called three witnesses.

PW-1 {Dr. Karomo} who testified and produced a post-Mortem on 17thFebruary 2020. Pw-2 {Hobson Mugo} testified on 25th April 2022. Pw-3{Simon Mbiri} testified on 21st September 2022.

The Applicant now Moves to this Court for Orders that proceedings in Kerugoya MCTR 217of 2019is a mistrial.

Issues for determination

1) Whether this Honourable Court should stay proceedings In Kerugoya MCTR 217of 2019is a mistrial.

2) Whether this Court should Court provides for costs the application.

We submit the trial Court took the applicant through Section 207 of the *Criminal Procedure Code* where it is provided that:

1) The substance of the charge shall be stated to the accused person by the Court and shall be asked whether he pleads guilty, or not guilty.

2) The trial Court recorded as nearly as possible in the words the applicant said {it is true}.

3) The trial Court convicted the applicant on count 3,4 and 5 after requiring the applicant to outline anything he wanted to state in mitigation. The applicant only pleaded for forgiveness. The charge and all its ingredients were explained

to the applicant. The applicant admitted in his own words and he confirmed the charge. The plea of guilt was unambiguous and unequivocal."

6. The full text of the plea taking proceedings on the first day of the trial on arraignment is as follows:

> " Count IV
>
> Accused:
>
> Niguo- True.
>
> Count V
>
> Accused: Niguo- True.
>
> Mr. Sitati For counts 3, 4 & 5 facts as per charge sheet.
>
> Court Counts 1 & 2 plea of guilty is entered.
>
> Accused can be released on bond of Kes. 200,000 plus a Surety
>
> Counts 3, 4 & 5 plea of guilty is entered.
>
> Accused be supplied with copies of the Charge Sheet and Statements.
>
> Ms. Sitati No records. Accused convicted on his own plea of guilt in counts 3, 4 & 5.
>
> Mitigation Accused Person- I pray for forgiveness.
>
> Court Counts 3, fine of Kes. 3,000 in default, one month in prison.
>
> Count 4, fine of Kes. 4,000 in default one month in prison.
>
> Count 5, fine of Kes. 4,000, in default one month in prison
>
> Sentences to run consecutively. Right of appeal- 14 days.
>
> Y.M.Baraza
>
> Senior Resident Magistrate 06/05/2019 Court
>
> For counts 1& 2 mention on 20/05/2019 at Court No. 2.
>
> Y. M. Baraza
>
> Senior Resident Magistrate
>
> 06/05/2019"

7. The trial Court's decision to direct that the accused proceed to trial for counts 1 and 2 must have been occasioned by an explanation given by the Accused but which was not captured on the record. There is no indication on the record that the accused had sought to explain his plea in a way that amounted to a denial of the offence to warrant the entry of a plea of not guilty and a trial.

8. This Court is able to see the basis for the trial for counts 1 and 2, which the accused admitted saying "it is true" because the record is clear that facts were not read for counts Nos. 1 and 2 and consequently the procedure for plea taking under the Adan v. R [1973 EA 445] principles was not complied with. Facts were only read for Counts 3, 4 and 5, and a conviction could only follow for those counts if the accused admitted them as the accused did.

9. Indeed, even the mitigation the accused gave was only shown after the conviction for the counts in 3, 4 and 5. Clearly, the plea of guilty was not accepted by the Count for the 2 counts.

10. In Kusenta v. R (1975) EA, the Court of Appeal for East Africa dealt with a not too dissimilar case and ruled that a plea of guilty to murder should only be accepted in the clearest case, and only a person who has pleaded not guilty should be tried, as follows:

> " There were procedural irregularities in connection with the trial of the first appellant which must be dealt with by this court. After originally pleading not guilty. when the trial was adjourned to the next sessions, the appellants were arraigned six months later before another judge. On this occasion the first appellant pleaded as follows: "Yes I killed him intentionally after Chilewa had asked me to kill the deceased."
>
> This was entered as a plea of guilty by the judge. We think that this was an error, for two reasons. Firstly, a plea of guilty to murder should only be accepted in the clearest of cases. Here the appellant was claiming' to have acted in response to a request. This was a qualification to his statement that he had killed intentionally, making his plea equivocal, and a plea of not guilty should have been entered. Secondly, only a person who has pleaded not guilty can be tried, see s. 267of the *Criminal Procedure Code*. Yet the first appellant, who was recorded as having pleaded guilty, was tried together with his fellow-accused as if he had pleaded not guilty. This was a grave irregularity, and if there was the slightest possibility of prejudice having been occasioned to the first appellant, we would have had to allow his appeal. However, we are satisfied that no prejudice was in fact occasioned. The only part played by the first appellant in the trial was that he repeated and adopted the full confession made by him extra-judicially. This had the effect of removing any possible ambiguity in his plea, so that in our view we can enter a conviction on that plea, and disregard the subsequent proceedings which, so far as he was concerned. were a nullity. There is absolutely no doubt as to his guilt, and his appeal against conviction is accordingly dis missed."

11. In this case, however, although not recorded, there must have been an explanation by the accused that prompted the Court not to accept the plea of guilty and direct a trial, and there having been no complete plea process including the setting out of facts of the case for the counts 1 and 2, there could not have been valid plea of guilty, and the order for trial was proper in the circumstances.

12. The trial itself was plagued by irregularity in that the Prosecution Case was reopened and evidence from two additional witnesses called after the accused had been put on his defence and mandatory provisions of section 200 of the *Criminal Procedure Code* with regard to the taking over of a trial by a court after the previous court has ceased to exercise jurisdiction on the matter were not followed.

13. Section 200 of the *Criminal Procedure Code* is as follows:

> " 200. Conviction on evidence partly recorded by one magistrate and partly by another
>
> (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
>
> (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

[*Act No. 13 of 1982*, First Sch., *Act No. 11 of 1983*, Sch.]

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

14. The court that inherited the case after the accused had been put on his defence on a ruling on case to answer reopened the case and took the evidence of two additional witnesses for the prosecution, PW and PW, respectively, doctor and Investigation Officer, without complying with provisions of section 200(3) of the Criminal procedure Code. The accused might have elected to have the case start de novo or have some witnesses recalled.

15. Although the accused was represented by Counsel who cross-examined the two witnesses, the calling of additional witnesses may upon consideration of the evidence as a whole at the end of the trial as counselled in Okethi Olale v. R [1965] EA 555, be found to be corroborative of the evidence previously given against the accused to the prejudice of the accused whose case had been closed at the first ruling on case to answer by the previous magistrate. The reopening is clearly prejudicial to the accused.

16. However, the mistrial finding must be restricted to the unnecessary proceedings for prosecution witnesses after the ruling on case to answer when the subsequent court reopened the case and two prosecution witness were called.

17. The powers of the Court on revision are set out in section 364 of the *Criminal Procedure Code* as follows:

"364. Powers of High Court on revision

(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.

(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 court 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, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

[*Act No. 10 of 1970*, Sch.]"

18. In exercise of its powers under section 364 of the *Criminal Procedure Code*, the Court shall pursuant to its supervisory jurisdiction correct the errors of the trial court.

19. The Court is compelled to declare a mistrial because even if the refusal to accept the plea of guilty was valid as the facts were not put to the accused for him to admit or reject them, the reopening of the case for the prosecution means that two extra witnesses were irregularly availed and this may be prejudicial when the court comes to weight the sufficiency of evidence in the case.

20. The Court has considered the remedy of a retrial which corrects defective trials. However, an order for retrial even before a court different constituted would just give an opportunity to the prosecution to amend the defects in this trial to the prejudice of the accused resulting in another unfair trial.

21. Consequently, the Court will declare a mistrial but only to the extent of the trial on the charges in Counts 1 and 2 of the Charge Sheet.

Orders

22. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The applicant's trial by the trial court for the offences of causing death by dangerous driving and failing to stop after an accident contrary, respectively, to sections 46 and 73 (1) of the *Traffic Act* cap 403 Laws of Kenya as charged in Counts I and II of the Charge Sheet dated 6/5/2019 in Kerugoya Chief Magistrate's Court Traffic Case No. 217 of 2019, R. v. Justo Nyaga Muriithi,

is declared a nullity and the proceedings are quashed and the orders putting the accused on his defence are set aside.

2. For avoidance of doubt the order for mistrial herein given is in respect only of the charges and proceedings on Counts Nos. 1 and 2 in Kerugoya MCTR/217/2019 Republic v Justo Nyaga Muriithi.

3. The trial court file shall be returned to the trial court for any further action in accordance with the directions of this Court herein.

4. Mention for directions before the trial court on 14/7/2025.

23. The Court does not make any order as to costs.

24. File closed.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JUNE 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for the DPP.

Mr. Eric Ngunjiri for the Applicant.